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Statement Under Rule 234

Brown. The original defendants were as appear on the summons. Upon the trial the title of the action was changed by eliminating "Times Square Book Shop" as a defendant and correcting defendant "Louis Finkelstein" to read "Louis Finkelstein doing business as Times Square Book Shop". At the trial the defendant "Pelley Book Shop" was eliminated and the defendant "Philip Pellegrino" was corrected to "Philip Pellegrino doing business as Pelley Book Shop". At the trial, the action was severed against the following defendants, who were not served with process: Anne Goldberg, Publishers Outlet and Gordon Law.

Notice of Appeal of Defendants, Kingsley Books, Inc. and Martin Kleinberg

SUPREME COURT

NEW YORK COUNTY

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Plaintiff,

—against—

KINGSLEY BOOKS, INC., MARTIN KLEINBERG, METROPOLITAN BOOK SHOP, INC., ANN GOLDBERG, LOUIS FINKELSTEIN, doing business as TIMES SQUARE BOOK SHOP, PHILIP PELLEGRINO, doing business as PELLEY BOOK SHOP, PUBLISHERS OUTLET and GORDON LAW,

Defendants.

SIR:

PLEASE TAKE NOTICE that the defendants, Kingsley Books, Inc. and Martin Kleinberg, pursuant to Section 588, sub. 4 of the Civil Practice Act, do hereby appeal to the Court of Appeals of the State of New York from the judgment of this court, dated July 26, 1955, and entered in the office of the Clerk of the County of New York on August 11, 1955, and from each and every part of said judgment.

Dated: New York, New York
August 12, 1955.

16 **Summons**

NEW YORK SUPREME COURT

COUNTY OF NEW YORK

ADRIAN P. BURKE, as Corporation Counsel of the City of New York,

Plaintiff,

—against—

KINGSLEY BOOKS, INC., MARTIN KLEINBERG, METROPOLITAN BOOK SHOP INC., ANNE GOLDBERG, TIMES
17 SQUARE BOOK SHOP, LOUS FINKELSTEIN, PELLEY BOOK SHOP, PHILIP PELLEGRINO, PUBLISHERS OUTLET, GORDON LAW,

Defendants.

To the above-named Defendants:

YOU ARE HEREBY SUMMONED to answer the complaint in this action and serve a copy of your answer or if the complaint is not served with this summons to serve a notice of appearance on the
18 Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear, or answer, judgment will be taken against you by default, in accordance with the notice herein.

Dated, New York, September 10, 1954.

ADRIAN P. BURKE,
Corporation Counsel,
Attorney for Plaintiff,
Office and Post-Office Address,
Municipal Building,
Borough of Manhattan,
New York City.

Complaint

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

[SAME TITLE]

Plaintiff, complaining of the defendants, alleges as follows:

1. That the plaintiff is the duly appointed Corporation Counsel of the City of New York.

2. That by the provisions of Sec. 22-a of the Code of Criminal Procedure of the State of New York, the Corporation Counsel of the City of New York is expressly empowered to maintain an action for an injunction against any person, firm or corporation who sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute any book, magazine, pamphlet, comic books, story paper, writing paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting, to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of the same.

3. Upon information and belief each of the defendants other than the defendants Kingsley Books, Inc. and Martin Kleinberg, is a person, firm or corporation in the City of New York, who

sells and/or is about to sell, or has in his possession with intent to sell a publication entitled "Nights of Horror".

4. Upon information and belief each of the defendants Kingsley Books, Inc. and Martin Kleinberg is a person, firm or corporation in the City of New York, who sells and/or distributes, and/or is about to sell and/or distributes, and/or has in his possession with intent to sell and/or distribute a publication entitled "Nights of Horror."

5. That all issues of said publication, "Nights of Horror" are obscene, lewd, lascivious, filthy, indecent and disgusting and in violation of the law. Annexed hereto and made a part hereof are issues numbered 1 through 14 of the publication, "Nights of Horror" as Exhibits 1 to 14 inclusive.

6. That the publication, "Nights of Horror", issues 1 through 14 is one which clearly comes within the purview of Sec. 22-a of the Code of Criminal Procedure.

WHEREFORE, plaintiff prays for a judgment as follows:

(a) Permanently enjoining and restraining the defendants their agents and servants from acquiring, selling and/or distributing any of the issues of the publication entitled "Nights of Horror";

(b) Directing said defendants, their agents and servants to surrender to the Sheriff of the County

of New York all and any issues of the publication entitled "Nights of Horror" within their possession and control and

(c) Directing the said Sheriff of the County of New York to seize and to destroy the same, and

(d) That plaintiff recover the costs and disbursements of this action and that plaintiff have such other and further relief as may be just and proper.

Dated: New York September 10, 1954.

ADRIAN P. BURKE, Esq.,
Plaintiff, in his representative capacity as Corporation Counsel of the City of New York

(Verified September 10, 1954.)

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Amended Answer of Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein

SUPREME COURT

NEW YORK COUNTY

[SAME TITLE]

29 Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, doing business as Times Square Book Shop, by Sidney Glasser, their attorney, for their amended answer to the complaint herein:

1. Deny any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in paragraphs numbered "2" and "3" of said complaint and therefore deny the same.

30 2. Deny each and every allegation contained in paragraphs numbered "4", "5" and "6" of said complaint.

AS AND FOR A FIRST SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, SAID DEFENDANTS ALLEGE:

3. That Section 22A of the Code of Criminal Procedure of the State of New York is unconstitutional, in that it is contrary to and violates the provisions of the United States and New York State constitutions.

Amended Answer of Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein

AS AND FOR A SECOND SEPARATE, DISTINCT AND AFFIRMATIVE DEFENSE, SAID DEFENDANTS FURTHER ALLEGE:

4. That the Charter of the City of New York fails to provide any authority to and precludes plaintiff from bringing this action.

WHEREFORE, said defendants demand judgment dismissing the complaint herein with costs.

SIDNEY GLASSER,
Attorney for Defendants, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, d/b/a Times Square Book Shop.

(Verified October 20, 1954.)

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Judgment Appealed From

At a Special Term, Part VI of the Supreme Court, held in and for the County of New York, at the County Court House, in said county on the 26 day of July, 1955.

Present:

HON. MATTHEW M. LEVY, *Justice.*

35

[SAME TITLE—NOTICE OF APPEAL PAGE 3]

The above entitled action having come on for trial before me at a Special Term, Part VI of this Court on the 14th day of December, 1954, and the plaintiff having appeared by Adrian P. Burke, Corporation Counsel (Murray Rudman, Esq. of Counsel), and the defendants Kingsley Books, Inc., and Martin Kleinberg, having appeared by Emanuel Redfield, Esq., and the defendant, Louis
36 Finkelstein, doing business as Times Square Book Shop, having appeared by Sidney Glasser, Esq., and the defendants Metropolitan Book Shop, Inc. and Philip Pellegrino, doing business as Pelley Book Shop not having appeared, and the defendants Anne Goldberg, Publishers Outlet and Gordon Law not having been served with process, and the plaintiff's motion to substitute Peter Campbell Brown, Corporation Counsel of the City of New York as plaintiff instead of Adrian P. Burke, Corporation Counsel of the City of New York, and to amend the title of this action

accordingly, having been granted, and the plaintiff's motion to amend the title of the action so as to read "Louis Finkelstein, doing business as Times Square Book Shop" instead of "Times Square Book Shop, Louis Finkelstein" and "Philip Pellegrino, doing business as Pelley Book Shop" instead of "Pelley Book Shop, Philip Pellegrino", having been granted, and the parties having presented their proofs upon the issues herein and the Court having reserved decision at the close of the entire case, and due deliberation having been had, and the Court having thereafter on the 13th day of June, 1955, made and filed its decision rendering judgment in favor of the plaintiff on the merits,

Now, upon motion of Peter Campbell Brown, Corporation Counsel, plaintiff in person, it is

ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment in his favor on the merits on the decision as rendered, and it is further

ORDERED, ADJUDGED AND DECREED that the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Philip Pellegrino, doing business as Pelley Book Shop, be and they hereby are permanently enjoined from distributing, selling or acquiring possession of Volumes I and II and Issues 3 to 14 inclusive of the volumes of the publication entitled "Nights of Horror" heretofore published, and it is further

40 ORDERED, ADJUDGED AND DECREED that the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Philip Pellegrino, doing business as Pelley Book Shop, are directed forthwith to surrender to the City Sheriff of the City of New York (New York County Division) all copies of volumes I and II and Issues 3 through 14 inclusive of the publication entitled "Nights of Horror" heretofore published and now in possession of said defendants; 41 said volumes to be destroyed by the Sheriff of the City of New York (New York County Division) upon receipt, and it is further

ORDERED, ADJUDGED AND DECREED that in the event the defendants Kingsley Books, Inc., Martin Kleinberg, Metropolitan Book Shop, Inc., Louis Finkelstein, doing business as Times Square Book Shop and Philip Pellegrino, doing business as Pelley Book Shop, fail to surrender all copies of the volumes of the publication entitled "Nights of Horror" heretofore published, and now in the 42 possession of said defendants to the City Sheriff of the City of New York (New York County Division) within two days after the entry of this judgment the aforesaid Sheriff of the City of New York (New York County Division) is directed to seize and destroy all of the aforesaid volumes, and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff Peter Campbell Brown, Corporation Counsel of the City of New York, (Municipal Building, Borough of Manhattan, New York City), recover

of the defendants Kingsley Books, Inc. (220 West 42nd Street, New York City), Martin Kleinberg (224-15—135th Avenue, Laurelton, L. I.), Metropolitan Book Shop, Inc. (1133—6th Avenue, New York City), Louis Finkelstein, doing business as Times Square Book Shop (225 West 42nd Street, New York City), and Philip Pellegrino, doing business as Pelley Book Shop (790—8th Avenue, New York City), the sum of $150 costs as taxed, and that said plaintiff have execution therefor.

Enter

M. M. L.
J. S. C.

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Case and Exceptions

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART VI

[SAME TITLE]

47 New York, December 14, 1954.

Before:

MR. JUSTICE MATTHEW M. LEVY

Appearances:

ADRIAN P. BURKE, Esq.,
Corporation Counsel of the City of New York,
Attorney for the Plaintiff,
By: MURRAY RUDMAN, Esq., of Counsel.

48 EMANUEL REDFIELD, Esq.,
Attorney for Defendants Kingsley Books, Inc., and Martin Kleinberg.

SIDNEY GLASSER, Esq.,
Attorney for Defendant Louis Finkelstein, doing business as Times Square Book Shop.

(All the other defendants have defaulted.)

Mr. Rudman: If your Honor please, all the defendants for whom appearance has not been noted have defaulted. The defendants Publishers

Outlet and Gordon Law were not served with process. Nor the defendant Anne Goldberg who is dead.

(Mr. Rudman made an opening statement to the Court.)

(Mr. Redfield made an opening statement to the Court.)

(Mr. Glasser made an opening statement to the Court.)

The Court: Mr. Redfield, do you desire to move to amend your answer in any respect?

Mr. Redfield: Yes, sir. I move to amend Paragraph 2 of the answer so as to eliminate the denial of Paragraph 4 of the complaint and to admit the facts alleged in Paragraph 4 of the complaint.

The Court: Are there any other proposed amendments?

Mr. Redfield: None other from me.

Mr. Glasser: On behalf of Louis Finkelstein, doing business as Times Square Book Shop, I ask the Court for permission to amend the answer of Paragraph 1 and admit that Paragraph 3 of the complaint, formerly denied in the answer, is now admitted.

FRANCIS X. CAIN, called as a witness in behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your occupation? A. Detective Police Department, Shield No. 1061, Central Office Bureau.

Q. Mr. Cain, how long have you been in the Police Department of the City of New York? A. Three and a half years.

Q. How long have you been a detective? A. Two years.

Q. During the last year, what have been your duties as a detective for the City of New York? A. I have been assigned to the Office of the Chief Inspector, relative to public morals.

Q. By that, what do you mean? A. Suppression of vice, gambling, alcoholic beverage control.

Q. I refer you to 1133 Sixth Avenue in the City of New York and I ask you if you are familiar with that address? A. Yes, sir, I am.

Q. Tell the Court the basis of your familiarity with that address? A. Premises 1133 Sixth Avenue is a four-story loft building. The name of the establishment on the ground floor is Metropolitan Book Shop, Inc.

Mr. Glasser: Objected to as not binding on my defendant.

The Court: He is merely describing the premises. Objection overruled.

By Mr. Rudman:

Q. Are you also familiar with the establishment of the Kingsley Book Company? A. Yes, sir.

Q. Are they located at 220 West 42nd Street? A. Yes, sir.

By the Court:

Q. Near what numbered street is 1133 Sixth Avenue? A. May I refer to some notes?

Q. Surely. A. I believe it is between 43rd and 44th Streets.

Q. You may check with your memorandum. A. That is correct, it is, your Honor.

By Mr. Rudman:

Q. And where is 220 West 42nd Street? A. On the south side of 42nd Street, between 7th and 8th Avenues, Manhattan.

Q. Describe the premises 220 West 42nd Street, to the best of your recollection? A. It is approximately a 24 or 25-story building. Kingsley Books, Inc. is located on the ground floor of the premises. 56

Q. When for the first time did you go to the Kingsley Books, Inc.? A. August 23rd.

By the Court:

Q. What year? A. 1954.

By Mr. Rudman: 57

Q. Did you enter the premises? A. I did.

Q. Tell the Court exactly what you did from the time you entered the premises until you left on that day.

Mr. Redfield: We have admitted Paragraphs 3 and 4 of the complaint. This seems to be a waste of time.

The Court: Mr. Glasser admitted Paragraph 3. Mr. Redfield admitted Paragraph 4 but Mr. Redfield has not admitted Paragraph 3 and Mr. Glasser has not admitted

58 *Francis X. Cain—for Plaintiff—Direct*

Paragraph 4. Therefore I will take the testimony.

Mr. Redfield: I assume we made the admission with regard to our respective clients who are alleged to have possession of these premises. If there is any doubt about it, we can again admit it.

The Court: But you have not done it and I can only go by the pleadings.

Mr. Redfield: If you are of the opinion
59 that Paragraph 3 of the complaint applies to Kingsley Books and Martin Kleinberg, then we admit the allegations of Paragraph 3 of the complaint.

The Court: I am not expressing an opinion. I am taking testimony with respect to the defendants who have appeared and with respect to the defendants who have appeared and with respect to the defendants who have been served and have defaulted, and I shall take all of the testimony.

In the event that it is not applicable to
60 your particular client, it will not be referrable to your client.

Mr. Redfield: I submit to your Honor, with deference, that it is just duplication.

The Court: What will I do with respect to the defendants who have defaulted? Have another hearing?

Mr. Redfield: I see what your Honor means.

By Mr. Rudman:

Q. Describe the establishment of the Kingsley Books, Inc., what you saw when you walked into

the premises? A. On the outside there are two display windows, the entrance being between the two display windows.

To the left of the entrance there is a cash register on a platform and on both sides and towards the rear there are book shelves upon which are displayed books.

There are desks in the middle of the floor and shelves, also displaying books.

To the left and behind the cash register there was a table approximately six feet long and about 62
three feet off the floor, upon which were displayed Volumes 1 to 16 of the book entitled "Nights of Horror."

Each volume is numbered and there were approximately 15 to 25 in the stack of each volume. I purchased two volumes of the book.

Q. Which volumes did you purchase? A. Correction—I purchased three volumes of Nos. 2, 5 and 7.

Q. Were Volumes numbered 1 through 14 in those stacks A. Yes, sir.

Q. When you say "stacks," was there a dif- 63
ferent volume in each one of the stacks or a different issue number? A. A different issue number.

Q. Did you look through each one of the stacks? A. Yes, sir.

Q. Tell the Court approximately how many were there in each of the stacks? A. There was a maximum of 25 and a minimum of 10 or 12.

Q. Did you make your purchase from the stacks? A. Yes, sir, I did.

Q. After you selected your books, what did you do with them? A. I presented them to a

64 *Francis X. Cain—for Plaintiff—Direct*

gentleman, an unidentified man I now know to be Martin Kleinberg who was at the register.

I gave him the books and I asked him how much it was and he told me it was six dollars. I paid him and I asked him for a receipt, which I received and I left the premises.

Q. Did you return to the premises on August 25, 1954? A. I did.

Q. And did you make another purchase on that day? A. Yes, sir.

65 Q. What volumes did you purchase? A. Nos. 3 and 4.

Q. What did you do with your selections after you made them? A. I presented the books to an unidentified man I now know as Arthur Zohn and I asked him how much it would be and he told me it was four dollars. I gave him the money and he gave me a receipt and I left the premises.

Q. Was Martin Kleinberg there at the time? A. Yes, sir.

Q. On August 25, 1954, did you also observe the same stacks you testified to that you saw on August 23, 1954? A. Yes, sir.

66 Q. And were all these issues on the table that you testified to that you observed on August 23, 1954? A. Yes, sir.

Q. I show you these books and I ask you if you have ever seen them before? A. Yes, sir, I have.

Q. Are those the books you testified to that you saw on the stacks on the table of the Kingsley Book Company? A. Yes, sir.

Q. On August 23rd and on August 25th? A. Yes, sir.

Mr. Rudman: I offer them in evidence.

Mr. Redfield: No objection.

Francis X. Cain—for Plaintiff—Direct 67

(Books received in evidence and marked Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L and 1-M.)

Mr. Rudman: Is it conceded that Volumes 15 and 16 are similar in type and design as Volumes 1 to 14?

Mr. Glasser: No. It is not involved in this proceeding at all. Volumes 15 and 16 were not enjoined against. 68

By Mr. Rudman:

Q. Did you examine Volumes 15 and 16 in the Kingsley Book Shop?

Mr. Redfield: Objected to as outside the pleadings.

Mr. Glasser: Same objection.

The Court: I will take it subject to connection. Do you have Volumes 15 and 16 here?

Mr. Rudman: No, sir. 69

By Mr. Rudman:

Q. Did you examine Volumes 15 and 16? A. Yes, sir.

Q. And were they similar in scope and design? A. Yes, sir.

Mr. Redfield: Objection as not the best evidence.

The Court: Objection sustained. Strike out the answer.

70 *Francis X. Cain—for Plaintiff—Direct*

By Mr. Rudman:

Q. When was the next time you visited the premises of the Kingsley Books, Inc., at 220 West 42nd Street? A. On September 10, 1954.

Q. What did you do at that time when you went to the premises? A. I had papers that were given to me by the Corporation Counsel, Mr. Milton Mollen, said papers being an injunction and an order to show cause, which was to be
71 served upon Kingsley Books, Inc., as a corporation and on Martin Kleinberg as President.

I entered the premises with a patrolman from the Legal Bureau of the Police Department of the City of New York.

Mr. Kleinberg was at the cash register at the time. I handed him the papers and I explained to him what they were. I told him that we were entitled to take an inventory of the books "Nights of Horror" that were on the premises.

I left Mr. Kleinberg and I walked towards the rear of the establishment and proceeded to the cellar.

72 There I saw two men, unknown to me at the time, but who I now know to be Louis Finkelstein and Edward Mishkin.

Mr. Mishkin asked me who I was. I identified myself as a police officer. I told him I had come down to take an inventory of the books "Nights of Horror." I told I had just served papers upon Mr. Kleinberg and that we were entitled to take the inventory.

Mr. Mishkin showed me where the books were in the rear of the store and I started to take the inventory. When I had completed it, there

were approximately 2,650 volumes of "Nights of Horror" in the cellar.

Q. Is this the inventory you prepared (handing witness paper)? A. Yes, sir.

Q. And did you see Martin Kleinberg sign that? A. Yes, sir.

Mr. Rudman: I offer that paper in evidence.

Mr. Redfield: No objection, except that it is just burdening the record. We have admitted all these facts. 74

(Inventory received in evidence and marked Plaintiff's Exhibit 2.)

By the Court:

Q. What does "SS" followed by a number mean? A. His Social Security number.

Q. What address? A. That is his home address.

By Mr. Rudman: 75

Q. Does this inventory you prepared include the books that were on the table in the store which you testified to on August 23rd and 25th? A. Yes, sir.

By the Court:

Q. These were the books you took an inventory of in the cellar? A. Yes, sir.

By Mr. Rudman:

Q. You testified you visited the premises 1133 Sixth Avenue, otherwise known as the Metropolitan Book Shop, Inc.? A. Yes, sir.

76 *Francis X. Cain—for Plaintiff—Direct*

Q. When for the first time did you visit the Metropolitan Book Shop, Inc.? A. On August 17, 1954.

Q. Describe those premises to the Court. A. They are a four-story loft building. Metropolitan Books is located on the ground floor of said premises. There are two glass show windows on the outside, with the doorway entrance in between the two. As you enter, the cash register of the establishment is on the left side. There are book
77 shelves to the left and right and to the rear of the store. There are desks in the middle of the floor with books thereon displayed for sale.

Q. Did you observe "Nights of Horror" in that book shop on August 17, 1954? A. Yes, sir.

Q. Where were they located? A. On the book shelf to the left in the rear of the cash register.

Q. Was that in open view of all customers? A. Yes, sir.

Q. Did you make any purchases on that day of "Nights of Horror"? A. Yes, sir.

Q. What issues of the "Nights of Horror" did
78 you purchase? A. Volumes 9, 11 and 14.

Q. And what did you do with your selection after you made it? A. I presented the books to a gentleman I now know to be Ira Rubian. I asked him how much the books would be. He told me $9.27.

Q. Did you pay the $9.27? A. I did.

Q. And did you receive a receipt for it? A. Yes, sir.

Q. Did you return to the Metropolitan Book Shop thereafter on August 18 1954? A. I did.

Q. And did you make any further purchases? A. Yes, sir.

Q. What books did you purchase on that day? A. Issues 12 and 13 of "Nights of Horror."

Q. Did you pay for it? A. Yes, sir.

Q. How much did you pay? A. $6.18.

Q. When you made the purchases in Kingsley Books, you paid for each one of the purchases, is that correct? A. Yes, sir.

Q. On August 17, 1954, when you made the purchases of issues Nos. 9, 11 and 14, how many issues of "Nights of Horror" did you see in the Metropolitan Book Shop? A. About five or six. 80

Q. And on August 18, 1954, how many did you see? A. About three or four.

Q. Thereafter and on September 10th, did you make your next visit there? A. I did.

Q. And was that for the purpose of serving these papers that you served on Kingsley on September 10, 1954? A. Yes, sir.

Q. You served a copy of that on Metropolitan Book Shop? A. Yes, sir.

Q. Who did you see at that time when you made the service? A. A man who identified himself as Mr. Ira Rubian.

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Q. And did you make an inventory of the books in the Metropolitan Book Shop, Inc., on September 10, 1954? A. Yes, sir, of "Nights of Horror."

Q. Where did you find the books to make the inventory? A. To the right of the store, about half way back, there was a small alcove in which the books were.

Q. I show you this paper and I ask you if that is the inventory you prepared on September 10, 1954, in the Metropolitan Book Shop, Inc., (handing paper to the witness)? A. Yes, sir, it is.

82 *Francis X. Cain—for Plaintiff—Direct*

Q. Did you make that inventory in the regular course of your business as a police officer in the Police Department of the City of New York? A. Yes, sir.

Q. And was it part of your duties to make that inventory on that day? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

Mr. Redfield: No objection.

83 (Inventory received in evidence and marked Plaintiff's Exhibit 3.)

Mr. Glasser: I would like to make a blanket objection, as not related to my clients.

The Court: The evidence will be taken. So far as it is not connected with your clients, it will not be considered as against your client.

By Mr. Rudman:

84 Q. That is the last time you visited the Kingsley or the Metropolitan Book Shop? A. Yes, sir.

Q. Subsequently did you have occasion to make an arrest of a person named Maletta in Queens? A. Yes, sir.

Q. Tell us the date and place of the arrest.

Mr. Glasser: Objection as not binding on the defendants. It is unrelated.

The Court: Objection overruled.

Mr. Glasser: Exception.

The Witness: Wednesday, September

85

14, 1954, at about 5:30 or 6 P.M., at premises 103-43 Lefferts Boulevard, Richmond Hill.

By Mr. Rudman:

Q. Tell the Court what type of premises those are.

The Court: How will you relate that with the main defendants in the case?

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Mr. Rudman: I will show that this is the printing establishment where "Nights of Horror" is printed.

The Court: I will take it subject to connection.

By Mr. Rudman:

Q. Tell the Court what type of premises those are. A. It is a two-story premises. The Pilgrim Press is located on the ground floor. The Pilgrim press was a gift card and stationery shop. In the rear the building was sub-let by another individual who sold watches and jewelry. The owner of the Pilgrim press was Mr. Eugene J. Maletta. He also had a cellar, the entrance to it being from the main floor of the card and gift shop.

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Q. Did you buy anything there pertaining to "Nights of Horror"? A. Yes, sir.

Q. What was it? A. We found Volume No. 1 of "Nights of Horror," which Mr. Maletta gave to us and he said he had printed it up.

Mr. Glasser: I move to strike out the conversations.

88 *Francis X. Cain—for Plaintiff—Direct*

The Court: Strike it out.
Mr. Rudman: Consented to.
The Court: Proceed.

By Mr. Rudman:

Q. Tell us what you observed. A. I observed what is known in the printing trade as a rubber mat. On the rubber mat, in inverted type, if you held it to a mirror you could read what was on there, were pages of one of the volumes of
89 "Nights of Horror." I picked up about 500 sheets of different pages of different volumes of "Nights of Horror."

Q. Tell the Court what type of printing presses were in that premises. A. There were two printing presses in there. I was told that they are known as photo offset printing.

Mr. Glasser: Objected to as not binding, as to what he was told.
The Court: Objection sustained.

90 *By Mr. Rudman:*

Q. Do you know those presses as being photo offset presses at the present time? A. Yes, sir.

Mr. Redfield: I object to the testimony concerning the printer as being utterly outside the issues in the case.
The Court: I will take it subject to connection.

By Mr. Rudman:

Q. Do you know whether or not the "Nights of Horrors" exhibits 1 through 1-M are printed in offset type? A. Yes, sir, they are.

Mr. Rudman: You may inquire.

Mr. Redfield: No questions. At this time I move to strike out this witness's testimony insofar as it relates to Mr. Moletta on the ground there has been no showing of any connection with the issues in the case.

The Court: You may move at the close of the plaintiff's case.

Mr. Glasser: No questions.

JAMES RUSHIN, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your position with the Police Department of the City of New York? A. Shield No. 2244—30th Squad—

Q. How long have you been such a detective? A. Two and a half years.

Q. How long have you been with the Police Department? A. Four and a half years.

Q. And for the past year what have been your duties with respect to your position? A. I am a precinct detective working on different cases that come into the squads.

Q. Assigned to the Morals Squad? A. Not definitely to the Morals Squad.

Q. On September 10th, did you visit the premises of the Times Square Book Shop? A. Yes, sir.

Q. Is that the first time you visited those prem-

94 ises? A. That was the second time. The first time was September 9th.

Q. In the Times Square Book Shop located at 225 West 42nd Street in the Borough of Manhattan, New York City? A. Yes, sir.

Q. Tell the Court what it looks like? A. It is a small shop approximately 15 feet wide, 30 feet long. It has a shelf on the left-hand side containing books, and shelves on the right-hand side.

95 Q. Is there a cash register in the store? A. Yes, sir, on the left of the door.

Q. Are there showcases as you enter the premises? A. There is a window on the left-hand side as you enter the store.

Q. Are books exhibited there? A. Yes, sir.

Q. Is there a sign outside which says, "Times Square Book Shop"? A. Yes, sir.

Q. On September 9, 1954, you went to the Times Square Book Shop? A. Yes, sir.

Q. What did you do? A. I went into the Book Shop and looked around. Then I went to the rear of the store, on the left of a counter, and

96 observed the book "Nights of Horror".

Q. How many copies of "Nights of Horror" did you see? A. There were 16 different issues, from one to three copies on each pile.

Q. About 40 in all? A. 40 to 45 approximately altogether.

Q. You bought one copy? A. Yes, sir.

Q. After you made your selection, what did you do with the copy? A. I took it to the clerk. I asked him the price. He told me "$2.00". I gave it to him and I left the premises.

Q. Did he wrap up the book? A. Yes, sir, in a bag.

Q. You came back the following day? A. Yes, sir. 97

Q. What did you do on that day? A. I had a copy of papers received from the Corporation Counsel. I presented them to the clerk, explained it to him, and I took an inventory of the books in the store at the time.

Q. Is this a copy of the inventory (handing witness paper)? A. Yes, sir.

Q. Was that made in the course of your regular duties as a police officer? A. Yes, sir. 98

Q. And was that pursuant to instructions given you by your superior? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

(Inventory received in evidence and marked Plaintiff's Exhibit 4.)

By Mr. Rudman:

Q. Are you familiar with the area within which 225 West 42nd Street is located? A. Not particularly. 99

Mr. Rudman: That is all.

Mr. Redfield: No questions.

Mr. Glasser: No questions.

JAMES J. MCCARTHY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination by Mr. Rudman:

Q. What is your occupation? A. Detective,

Shield No. 196, assigned to Manhattan River Front Squad.

Q. How long have you been with the Police Department? A. Seven years this month.

Q. How long have you bee a detective? A. A year and four months.

Q. What are your duties? A. General investigation on the river front.

Q. You don't make the investigations of morals? A. No, sir.

Q. Are you familiar with the premises 790 Eighth Avenue in the Borough of Manhattan, City of New York? A. Yes, sir.

Q. And is that the Pelley Book Shop? A. Yes, sir.

Q. Did you visit the premises on September 9, 1954? A. I did.

Q. Will you tell the Court what the premises appeared to be or what they looked like to you? A. Pelley's Book Shop is on the street level of a 5-story brick building, apparently a tenement.

It is a one-window store, approximately 25 to 30 feet wide, about 50 feet deep.

As you enter, the door is on the left side of the main display window. There are three walls covered with book shelves, the left-hand wall, the rear wall, the right-hand wall tiered shelves.

In the middle of the floor there is a tiered table containing books and to the left of the entrance is a raised platform enclosed where the proprietor, I imagine, sits.

Q. Did you see any "Nights of Horror" in the store on that day? A. On the left rear wall, about the third shelf from the floor, there was a shelf approximately 5 feet in length. On it was

displayed about 12 copies of the book "Nights of Horror".

Q. What volumes? A. They were various, from one to twelve.

Q. Did you buy any that day? A. I purchased a copy of the "Nights of Horror" No. 12.

Q. After you made your selection, what did you do with the book you purchased? A. I took it to the man on duty. I asked him the price. He said it was $4. I bought it. I asked him his name. He said that he was just watching the store while 104
the owned stepped out. Then the owner came in and I spoke to the owner. I identified myself as the detective and he identified himself as Philip Pellegrino, the owner of the shop.

Q. On September 10, 1954, did you come back to the premises? A. I did.

Q. What did you do? A. I had various papers to serve on the owner of the shop. I did that and I took an inventory of the books he had of "Nights of Horror".

Q. Were those papers given to you by the Corporation Counsel? A. Yes, sir.

Q. Was that an order to show cause and affidavit and summons and complaint? A. Yes, sir. 105

Q. They were in connection with this case? A. Yes, sir.

Q. Did you make an inventory of the books "Nights of Horror" that you found in the store on that day? A. I did.

Q. And is this the inventory (handing witness paper)? A. Yes, sir.

Q. And was that made in the regular course of your duties as a police officer? A. Yes, sir.

106 *James J. McCarthy—for Plaintiff—Direct*

Q. Pursuant to instructions of your superiors? A. Yes, sir.

Mr. Rudman: I offer it in evidence.

(Inventory received in evidence and marked Plaintiff's Exhibit 5.)

By Mr. Rudman:

Q. Are you familiar with the general area in
107 which 790 Eighth Avenue finds itself? A. Fairly so.

Q. And are you also familiar with the area around 1133 Sixth Avenue? A. Yes, sir.

Q. And 220 West 42nd Street and 225 West 42nd Street? A. Yes, sir.

Q. Is that a crowded area? A. Yes, sir.

Q. Do you know how they refer to that area?

Mr. Glasser: Objected to.

By Mr. Rudman:

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Q. Is it known as the crossroads of the world? A. It is the Times Square area.

Q. Are you familiar with 1133 Sixth Avenue? A. I am not sure.

Q. Do you know where 220 West 42nd Street is? A. Yes, sir. It is between Seventh and Eighth Avenues.

Q. Are visitors from out of town usually present in that area?

Mr. Glasser: Objected to as too general.

The Court: Objection overruled.

Mr. Glasser: Exception.

By the Court:

Q. Do you know anything about it? A. Yes, sir. There are quite a few out of town people who visit the section.

By Mr. Rudman:

Q. Is it a theatre section? A. Yes, sir.

Q. Does it attract young as well as old people? A. Yes, sir.

Q. And does it attract teen-agers? A. Yes, sir. 110

Mr. Glasser: Objected to. This man is no expert on what it attracts.

The Court: Objection sustained.

By Mr. Rudman:

Q. Have you patroled that area? A. Yes, sir.

Q. Have you seen many teen-agers there? A. Yes, sir.

Q. When is the last time you were in that area, either as a patrolman or detective? 111

Mr. Redfield: Objected to as outside the issues of the case.

Mr. Rudman: Will it be conceded that this area, the Times Square area, is a high traffic area, attracting teen-agers, middle-aged persons and old people?

Mr. Redfield: I so concede, but I doubt the relevancy.

Mr. Glasser: Same objection.

Mr. Rudman: Will it be conceded that

112 *Motion to Amend Title and for Severance*

the Times Square area attracts visitors from out of town?

Mr. Redfield: Yes.

Mr. Glasser: Yes.

Mr. Rudman: That is all. The plaintiff rests.

The Court: We will take a recess now until 2 p.m.

(Whereupon, a recess was taken until 2 p.m.)

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AFTERNOON SESSION

2 P.M.

(Trial Continued.)

Mr. Rudman: The plaintiff moves to amend the title of the action insofar as the defendants Times Square Book Shop, Louis Finkelstein are concerned, by striking out "Times Square Book Shop" and inserting "Louis Finkelstein, doing business as

114 Times Square Book Shop."

The plaintiff further moves to amend the title of the action insofar as the defendants "Pelley Book Shop, Philip Pellegrino" are concerned by striking out "Pelley Book Shop" and naming "Philip Pellegrino" as the defendant doing business as Pelley's Book Shop.

The plaintiff further moves, as far as the action as against the defendant Anne Goldberg who is deceased and who was not served with process, the defendant moves to sever the action.

Motion to Amend Title and for Severance Stipulations 115

The plaintiff further moves to sever the action as against the defendants Publishers Outlet and Gordon Law, who were not served with process.

It is hereby stipulated by and among the counsel for the respective parties hereto as follows:

That by order to show cause dated September 10, 1954, the plaintiff moved this Court for a temporary injunction. 116

This order to show cause and the papers were served on September 10, 1954, returnable September 14, 1954.

On September 22, 1954, a temporary injunction order was signed by Mr. Justice William C. Hecht, Jr., for the relief requested, upon consent of the attorney appearing for the parties at that time.

The case was set for trial in Special Term Part 3 for November 4, 1954 and after adjournment was tried today.

The order to show cause signed by Mr. 117
Justice Edgar J. Nathan, Jr., dated September 10, 1954, and the order dated September 27, 1954, signed by Mr. Justice William C. Hecht, Jr. and the order dated September 22, 1954 signed by Mr. Justice William C. Hecht, Jr. may be deemed a part of the record of this trial.

It is hereby stipulated by and between and among the attorneys for the respective parties hereto that findings of fact and conclusions of law are waived. All briefs are to be submitted by noon of Friday, December 17, 1954.

118 *Motions to Dismiss Complaint*

It is hereby stipulated by and between and among the attorneys for the respective parties hereto that so much of Paragraph 2 of Section 22-A of the Code of Criminal Procedure which provides that "A decision shall be rendered by the Court within two days of the conclusion of the trial" is hereby waived.

Mr. Redfield: The defendant Kingsley Books, Inc. and Martin Kleinberg move to
119 dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against the defendants in that we claim that Section 22-A of the Code of Criminal Procedure, which is the alleged source of authority for this action, is unconstitutional on its face and as applied herein in that it violates the due process clause of the 14th amendment to the Constitution of the United States because Section 22-A provides for a restraint upon publications and their distribution and thus is an
120 interference with the freedom of the press.

These defendants further move to dismiss the complaint on the ground that the plaintiff has failed to prove facts sufficient to constitute a cause of action against these defendants, in that Section 22-A of the Code of Criminal Procedure and particularly Subdivision 3 thereof violates the Constitution of the State of New York, Article 1, Section 12, which protects persons against unreasonable seizure.

Furthermore, this same Section and Sub-

division violate the due process provisions of the 14th Amendment to the Constitution of the United States in that they provide for the seizure and destruction of books, thus additionally infringing upon the freedom of the press.

The Court: Decision reserved.

Mr. Glasser: On behalf of the defendant Louis Finkelsten, doing business as Times Square Book Shop, I move to strike out the entire testimony concerning Eugene Malleta and the Pilgrim Publishing Company or Pilgrim Press because the plaintiff has failed to connect it sufficiently with the defendants in this action. 122

The Court: Decision reserved.

Mr. Glasser: The defendant further moves to dismiss the complaint on the ground set forth by my colleague Mr. Redfield and further states that the plaintiff has utterly failed to prove that the books, volumes 1 to 14 of "Nights of Horror" are lewd, indecent and lascivious, has offered no evidence whatsoever. 128

The Court: Decision reserved.

Mr. Redfield: The defendants Kingsley Books and Martin Kleinberg wish to withdraw Paragraph 4 of their answer so far as it pertains to them and we so move.

The Court: Motion granted.

Mr. Redfield: The defendants Kingsley Books and Martin Kleinberg rest. We renew the motions made at the end of the plaintiff's case.

The Court: Decision reserved.

Mr. Glasser: At this time the defendant Louis Finkelstein, doing business as Times Square Book Shop, rests and makes the same motion as made at the end of the plaintiff's case.

The Court: Decision reserved.

Mr. Rudman: The plaintiff rests.

The Court: The motions to amend the title of the action and for a severance against the deceased defendant Anne Goldberg are granted.

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Decision is reserved on the case as a whole.

Final submission by noon Friday, December 17, 1954.

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Stipulation as to Exhibits

COURT OF APPEALS

STATE OF NEW YORK

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Plaintiff-Respondent,

—against—

KINGSLEY BOOKS, INC., *et al.*,

Defendants-Appellants.

IT IS STIPULATED by and between the attorneys for the respective parties hereto that Plaintiff's Exhibits 1, 1-A, 1-B, 1-C, 1-D, 1-E, 1-F, 1-G, 1-H, 1-I, 1-J, 1-K, 1-L and 1-M, consisting of Volumes I and II and Issues 3 through and including 14 of the publication known as "Nights of Horror", and Plaintiff's Exhibits 2, 3, 4 and 5, consisting of inventories of copies of the said publication need not be printed in the record of this case, but that the same may be handed up to the Court by any party upon the argument of the appeal.

Dated: New York, N. Y.
September 28, 1955

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defenants-Appellants

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

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Opinion by Levy, J.

(142 N. Y. S. 2d 735)

The Penal Law of this State has for some time made it a misdemeanor to sell or distribute "any obscene, lewd, lascivious, filthy, indecent or disgusting book, magazine, pamphlet, newspaper, story paper, writing, paper, phonograph record, picture, drawing, photograph, motion picture film, figure or image, or any written or printed matter of an indecent character", Penal
131 Law, §1141, subd. 1. More recently, the Legislature enacted section 22-a of the Code of Criminal Procedure, providing that, "The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles" as defined there and in section 1141 of the Penal Law, and in the event that a final judgment of injunction be issued, the judgment "shall contain a provision directing the person, firm or corporation [against whom the injunction is granted] to surrender to the sheriff of the county in which the action was brought any of the
132 matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same." The Code section provides further that the person authorized to maintain the action is the chief executive or legal officer in any city, town or village in the State, subd. 1. In the City of New York, the latter official would be the corporation counsel.

Pursuant to section 22-a, the plaintiff, as Corporation Counsel of the City of New York, has instituted this action against a number of persons, firms and corporations, for the purpose of

(1) permanently enjoining the defendants from acquiring, selling or distributing any of the issues of a series of booklets entitled "Nights of Horror"; (2) directing the defendants to surrender to the Sheriff of the County of New York all issues of the publication within their possession and control, and (3) directing the Sheriff to seize and destroy them. Those defendants who have answered deny the allegation of the complaint that the publication is obscene, and in effect interpose three separate defenses: that 134
the plaintiff lacks the required legal authority to maintain this action; that section 22-a is an unconstitutional restraint on freedom of the press; and that section 22-a violates the constitutional protection against unreasonable seizures. This case has been considered by the parties, and found by the court, to be the first submission of the constitutional issues thought to be involved in the application of section 22-a. (The statute is set forth in the margin).*

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* Code of Criminal Procedure, section 22-a, as amended L. 1954, c. 702, eff. July 1, 1954: 135

"The supreme court has jurisdiction to enjoin the sale or distribution of obscene prints and articles, as hereinafter specified:

"1. The chief executive of any city, town or village or the corporation counsel, or if there be none, the chief legal officer of any city, town, or village in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecedent character, which is obscene, lewd, lascivious, filthy, indecedent or disgusting, or which contains an article or instrument of indecent or immoral use

The act of obscenity has been an offense against the public order for centuries (see Sir Charles Sydlyes Case, 1 Keble 620 [K.B. 1663]; Harris and Wilshere's Criminal Law, 16th ed., pp. 169-170; 1 Bishop on Criminal Law, 9th ed., §§500, 504; Alpert, Judicial Censorship of Obscene Literature, 52 Harv.L.Rev. 40-43). Printed obscenity has been deemed a crime at common law for generations. Commonwealth v. Holmes, 17 Mass. 336; see Grant and Angoff, Massa-
137 chusetts and Censorship, 10 Boston Univ.L.Rev. 52-56. The essence of the statute now known as section 1141 of the Penal Law was first enacted in the State of New York in 1881, Penal Code, §317. "It is to be observed that the statute [then Penal Code, §317] does not undertake to define obscene or indecent pictures or publications. But

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or purports to be for indecedent or immoral use or purpose; or or in any other respect defined in section eleven hundred forty-one of the penal law, may maintain an action for an injunction against such person, firm or corporation in the supreme court to prevent the sale or further sale or the distribution or further distribu-
138 tion or the acquisition or possession of any book, magazine, pamphlet, comic book, story paper, writing, paper, picture, drawing, photograph, figure or image or any written or printed matter of an indecedent character, herein described or described in section eleven hundred forty-one of the penal law:

"2. The person, firm or corporation sought to be enjoined shall be entitled to a trial of the issues within one day after joinder of issue and a decision shall be rendered by the court within two days of the conclusion of the trial.

"3. In the event that a final order or judgment of injunction be entered in favor of such officer of the city, town or village and against the person, firm or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm or corporation to surrender to the sheriff of the county in

the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning." People v. Muller, 96 N. Y. 408, 410.

The fact that the mores of the times change from one generation to another, or that they are not the same in every land and clime, does not render the statutory definition meaningless. See Learned Hand, J., in United States v. Kennerley, D. C., 209 F. 119, 121. Of course, 140
to be constitutionally valid, what is statutorily interdicted "must be defined with appropriate definiteness." Pierce v. United States, 314 U. S. 306, 311, 62 S. Ct. 237, 240, 86 L. Ed. 226. Thus it is that "immoral" Superior Films, Inc., v. Department of Education, 346 U. S. 587, 74 S.

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which the action was brought any of the matter described in paragraph one hereof and such sheriff shall be directed to seize and destroy the same.

"4. In any action brought as herein provided such officer of the city, town or village shall not be required to file any undertaking before the issuance of an injunction order provided for in paragraph two hereof, shall 141
not be liable for costs and shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm or corporation sought to be enjoined.

"5. Every person, firm or corporation who sells, distributes, or acquires possession with intent to sell or distribute any of the matter described in paragraph one hereof, after the service upon him of a summons and complaint in an action brought by such officer of any city, town or village pursuant to this section is chargeable with knowledge of the contents thereof."

[1] So in enrolled bill. Second "or" probably should be omitted.

[2] By stipulation entered upon the record, the parties duly waived this requirement, and the court therefore did

Ct. 286, 98 L. Ed. 329, reversing Commercial Pictures Corp. v. Board of Regents, 305 N. Y. 336, 113 N. E. 2d 502, "'injurious to public morals'" Musser v. State of Utah, 333 U. S. 95, 68 S. Ct. 397, 398, 92 L. Ed. 562, and "collections of criminal deeds of bloodshed or lust", Winters v. People of State of New York, 333 U. S. 507, 513, 68 S. Ct. 665, 669, 92 L. Ed. 840, have been held to provide no reasonable, ascertainable standards. In order for the Legislature to achieve
143 reasonable certainty—within constitutional limitations—it is not, however, necessary that the language be narrowed in such a manner as to allow no flexibility; rather, ordinary terms may be used to express ideas which adequately describe that which is prohibited when measured by the modes of common usage and understanding in the community. Sproles v. Binford, 286 U. S. 374, 393, 52 S. Ct. 581, 76 L. Ed. 1167; Jordan v. De George, 341 U. S. 223, 231-232, 71 S. Ct. 703, 95 L. Ed. 886.

Repeated challenges to the definiteness of the
144 term "obscene" have been rejected. Chaplinsky v. State of New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 347, 121 N. E. 2d 585; Lockhart and McClure, Literature, the Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 324-350. There is no question but that the term "obscene" is sufficiently definite to be used—even in a criminal statute. Winters v. People of State of New York, 333 U. S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840. "The Legislature has declared in this section [Penal Law, §1141] that no obscene, [illegible] or disgusting book shall be sold,

Language could not be plainer." Crane, J., dissenting, in Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 14, 136 N. E. 219, 223. And while it has been thought, United States v. Reese 92, U. S. 214, 23 L. Ed. 563, that it is not necessarily a basis for vital distinction that a statute imposes no criminal sanctions (and that is true of section 22-a, although it is incorporated in the Code of Criminal Procedure), it is recognized that "[t]he standards of certainty in statutes punishing for offenses is higher than in 146
those depending primarily upon civil sanction for enforcement." Winters v. People of State of New York, 333 U. S. 507, 515, 68 S. Ct. 665, 670, 92 L. Ed. 840.

Some of the defendants have denied that the publications fall within the proscription of section 22-a. The classic legal test for obscenity is "whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" (Regina v. Hicklin, L. R. [1868] 3 Q. B. 360, 147
371). This definition, expressed long ago, seems rather strict and has been often criticized. United States v. One Book Called "Ulysses", D. C., 5 F. Supp. 182, affirmed United States v. One Book Entitled Ulysses by James Joyce, 2 Cir., 72 F. 2d 705; United States v. Levine, 2 Cir., 83 F. 2d 156; United States v. Dennett, 2 Cir., 39 F. 2d 564, 76 A. L. R. 1092; United States v. Kennerley, D. C., 209 F. 119; Ernst and Lindey, The Censor Marches On, pp. 2, 22, 188; Buchsbaum, Constitutional Law—Censorship—Statutory Construc-

148 be the standard sustained by our Court of Appeals, People v. Doubleday & Co., Inc., 297 N. Y. 687, 77 N. E. 2d 6, affirmed 335 U. S. 848, 69 S. Ct. 79, 93 L. Ed. 398; People v. Muller, 96 N. Y. 408, 411; People v. Berg, 241 App. Div. 543, 272 N. Y. S. 586, affirmed 269 N. Y. 514, 199 N. E. 513; but see People v. Wendling, 258 N. Y. 451, 453, 180 N. E. 169, 81 A. L. R. 799.

The only question before the court in Besig v. United States, 9 Cir., 208 F. 2d 142, was 149 whether the books were obscene. Obscene was defined, Id., at page 145, as "indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions * * *." The court found the books in that case to be just that, and the language therein "related without the slightest expressed idea of its abandon." (ibid.) Judge Stephens felt that not only must the young and pure be protected, but that the Congress must have realized, when the statute there involved [19 U. S. C. A. §1305(a)] was passed, "that salacious print in the hands of 150 adults, even in the hands of those whose sun is near the western horizon, may well incite to disgusting practices and to hideous crime." 208 F. 2d at page 146. The court continued: "We share the general antipathy to censorship and we are aware that individual tastes and special occasions and different times and different peoples differ as to what is offensive language. Yet we risk the assertion that there is an underlying, perhaps universal, accord that there is a phase of respectable delicacy related to sex, and that those compositions which purposefully flaunt [flout?] * * * come under the ban of the

In determining what is obscene in any particular case, "[t]he law will not hold the crowd to the morality of saints and seers" (Cardozo, Paradoxes of Legal Science, p. 37). Neither will the law honor the views of the bestial and the debased. Nor should it be governed by the morals of the prude on the one hand or of the perverted on the other. "All that we can say is that the line will be higher than the lowest level of moral principle and practice, and lower than the highest." (Cardozo, supra, p. 37.) Sex relationships 152
can be and normally are beautiful, profound, inspiring and healthy. And some of the finest literature of all time—of fact and fancy, lasting and cherished through the ages—has presented and discussed, analyzed and novelized the concept of sex. Not so the present publications. If ever there could be found appropriate applicability for section 22-a, this case emerges as the perfect example of what the Legislature has sought to curb. Judge Learned Hand felt that the word "obscene" should "be allowed to indicate the present critical point in the compromise between candor 153
and shame". United States v. Kennerley, D. C., 209 F. 119, 121. No such problem is here presented; for "Nights of Horror" will be found resting at the foot of the scale, clearly marked "shame". No matter how strict the test or how broad the criteria, these volumes will readily measure up to and even surpass the most generous standard. The booklets in evidence offer naught but glorified concepts of lustful and vicious concupiscence, and by their tenor deride love and virtue, invite crime and voluptuousness, and excite lecherous desires. See People v.

170, 81 A. L. R. 799. There is no true dissemination of lawful ideas—rather is there a direct incitement to sex crimes and the sordid excitement of brutality. These booklets are sold indiscriminately to all who may wish to purchase them—men and women, adults and youths of both sexes. The publications have a libidinous effect upon ordinary, normal, healthy persons; their effect upon the abnormal individual may be disastrous to him and to others as well.

155 These booklets are not sex literature, as such, but pornography, unadulterated by plot, moral or writing style. That there is no attempt to achieve any literary standard is obvious. Each issue is a paper-covered booklet of from 70 to 96 pages, with a suggestive sex drawing on the front cover under the caption "Nights of Horror". The price varies from $1.98 to $3.00 per issue. The volumes are replete with mispelled words, typographical errors, faulty grammar, misplaced pages and generally poor workmanship. While these factors do not, of course, classify the issues as pornographic, they are 156 somewhat helpful in ascertaining whether there truly exists a genuine literary intent. "Nights of Horror" makes but one "contribution" to literature. It serves as a glossary of terms describing the private parts of the human body (notably the female breast, buttocks and vagina), the emotions sensed in illicit sexual climax and various forms of sadistic, masochistic and sexual perversion. The volumes before me are not a description of a period of history or the people and character of an earlier time and of their conduct and habits of life. They are not a relating of folk tales or stories of primitive people living

in isolated regions. They do not purport to depict the lives and customs of those who are here now or are expected to inhabit this land or this earth in the time to come: See People v. Berg, 241 App. Div. 543, 544, 272 N. Y. S. 586, 587, affirmed 269 N. Y. 514, 199 N. E. 513.

"Nights of Horror" is no haphazard title. Perverted sexual acts and macabre tortures of the human body are repeatedly depicted. The books contain numbers of acts of male torturing female and some vice versa—by most ingenious means. 158
These gruesome acts included such horrors as cauterizing a woman's breast with a hot iron, placing hot coals against a woman's breasts, tearing breasts off, placing hot irons against a female's armpits, pulling off a girl's fingernails with white-hot pincers, completely singeing away the body hairs, working a female's skin away from her flesh with a knife, gouging and burning eyes out of their sockets, ringing the nipples of the breast with needles. Hanging by the thumbs, hair pulling, skin burning, putting on bone-compressing iron boots, were usual. The torture rack abounded. Self-torture was frequent. Sucking a 159
victim's blood was pictured; and so was pouring molten lead into a girl's mouth and ears; and putting honey on a girl's breasts, vagina and buttocks—and then putting hundreds of great red ants on the honey. Sodomy, rape, lesbianism, seduction prevail. Youngsters disrobing in the presence and to the detailed recorded delight of elderly males was described. Incidental training of the teen-ager to narcotic addiction and sexual perversion was part of the activities engaged in. The volumes expressed a philosophy of man's

omnipotent physical power over the female of the species. On occasion, the young woman is said to have gained satisfaction from the brutal beatings and horrible tortures. If she did not enjoy them, she received the beatings and tortures anyway—until she submitted to the sex acts desired by her tormentor. These brutalities were "my supreme pleasure" to the male, and resulted in "I'll be your slave" to the female. (It is not to be taken that I have, in any measure, given
161 a complete report of the "Nights of Horror". I felt that I had to mention some not the most sordid, features of this publication in view of the serious issues raised in this case—but I need not, I think, describe all I was compelled to read.)

While it appears, as a study of earlier cases will indicate, that some courts have held a publication obscene on the basis of selected passages, United States v. Bennett, Fed. Cas. No. 14,571, 16 Blatchf. 338; Commonwealth v. Friede, 271 Mass. 318, 171 N. E. 472, 69 A. L. R. 640; Commonwealth v. Buckley, 200 Mass. 346, 86
162 N. E. 910, 22 L. R. A., N. S., 225, each volume here was read (a distasteful task, it turned out to be—to say the least) to determine whether, taken as a whole, it was obscene within the proscription of the statute. Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 4, 136 N. E. 219, 220; Bisig v. United States, 9 Cir., 208 F. 2d 142, 146; Commonwealth v. Isenstadt, 318 Mass. 543, 548-549, 62 N. E. 2d 840; United States v. "One Book Called "Ulysses", D. C., 5 F. Supp. 182, 185, affirmed United States v. One Book Entitled Ulysses by James Joyce, 2 Cir., 72 F. 2d 705; Roth v. Gold-

man, 2 Cir., 172 F. 2d 788, 790, Frank, J., concurring. Suffice it to say at this point that there is not a single "story" which is not "obscene, lewd, lascivious, filthy, indecent or disgusting."** More often than not these adjectives must be used in combination, and with many others in the same vein, to describe adequately any one issue. The whole here is "emetic" and "aphrodisiac". See United States v. One Book Called "Ulysses", D. C., 5 F. Supp. 182, 185.

The authors have left nothing to fantasy or 164
to the unimaginative mind. The volumes are vividly detailed and illustrated. The many drawings that embellish these stories are obviously intended to arouse unnatural desire and vicious acts. Violence—criminal; sexual—degradation and perversion—are the sole keynote. Sadism and masochism are pictured as appropriate characteristics of human nature and pleasure. In short, the volumes of "Nights of Horror" in evidence before me are obscene and constitute pornography—"dirt for dirt's sake", United States v. One Book Called "Ulysses", D. C., 5 165
F. Supp. 182, 184, bestiality, lust, crime, horror, for their unfortunate sake—and for the ugly sake of filthy commerce in human weakness. Anne Lyon Haight has compiled a revised and enlarged edition of "Banned Books: Informal Notes on Some Books Banned for Various Reasons at Various Times and in Various Places" (2d ed., 1955). This chronological list of books banned from 387 B.C. to 1954 A.D. (with no attempt to be all inclusive) was compiled with

** From time to time throughout this opinion, for purposes of convenience, I use the single word "obscene" rather than the several words of the statute.

the idea of showing the trend of censorship throughout the years and the change in thought and taste. Most of the books there recorded fall under a ban because of religion, politics or morality, making the offense one of heresy, treason or obscenity. Among them are books which have withstood the condemnation of their immediate times to become the classics of today. "Nights of Horror" does not deserve to be listed among the missing when the next edition
167 of "Banned Books" is published.

It is urged by all of the contesting defendants that, notwithstanding any determination that I make as to the obscene character of "Nights of Horror", section 22-a is unconstitutional on its face and therefore void. It is contended, firstly, that the statute violates federal and state constitutional guarantees against interference with a free press; and, secondly, that in part it violates constitutional protections against unlawful seizures. I shall examine these points separately.

168 The First Amendment to the Constitution of the United States provides that "Congress shall make no law * * * abridging the freedom of speech, or of the press". The First Amendment is applicable to the several states via the due process clause of the Fourteenth Amendment. Gitlow v. People of State of New York, 268 U. S. 652, 666, 45 S. Ct. 625, 69 L. Ed. 1138; Near v. State of Minnesota, 283 U. S. 697, 707, 51 S. Ct. 625, 75 L. Ed. 1357; Grosjean v. American Press Co., Inc., 297 U. S. 233, 249, 56 S. Ct. 444, 80 L. Ed. 660. Article I, Section 8, of the Constitution of the State of New York, provides that "Every citizen may freely speak, write and publish his

sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Each of these constitutional provisions is a grave mandate requiring sincere and primary recognition when legislation is challenged as running afoul of their powerful protection, and, in my view, compels devoted judicial obeisance.

No doubt, "the rights of the best of men are secure only as the rights of the vilest and most 170
abhorent are protected." Pound, J., dissenting, in People v. Gitlow, 234 N. Y. 132, 158, 136 N. E. 317, 327, affirmed 268 U. S. 652, 45 S. Ct. 625, 69 L. Ed. 1138. And no doubt, too, the rights of the best of books are dependent upon the judicial protection to be afforded those having the least social value. Indeed, even publications of no social worth are entitled to be shielded from unlawful or unconstitutional restraint. Winters v. People of State of New York, 333 U. S. 507, 510, 68 S. Ct. 665, 92 L. Ed. 840. Were "The Nights of Horror" works which indicated the slightest 171
effort to contribute to our culture or knowledge, I might find myself in the position of "holding my nose with one hand" and "upholding with the other the right of free speech" that they are claimed to represent (see Judge Curtis Bok, "If We are to Act Like Free Men", Saturday Review, Feb. 13, 1954, p. 9, at p. 10, col. 3). But the volumes before me are so totally lacking in merit, and so obviously pornographic in intent, that their banning poses no threat to freedom of expression in literature or otherwise. To borrow a thought from Judge Learned Hand, I can well say that the plea of the present defendants, in-

voking the sacred constitutional guaranty of free press, is an effort to "misuse the privilege as a cover for lewdness and a stalking horse from which to strike at purity". United States v. Kennerley, D. C., 209 F. 119, 121.

I would not want or (if I could avoid it) permit this court to become a licensor, a censor, a book-burner. But a judicial tribunal should not and cannot avoid its responsibility. "Publications found by fair process to violate literate,
173 adult and clearly defined standards of decency or other criminal safeguards can serve no useful purpose for the community, and [judicial?] interference with their dissemination we find nonobjectionable." (Report on Book Burning, Committee on the Bill of Rights, The Record of the Association of the Bar of the City of New York, Vol. 10, No. 3, March, 1955, p. 143).

At this point, I shall note two cardinal and basic tenets for my view that the statute is not vulnerable on the ground of an allegedly unconstitutional infringement of the freedom of the
174 press—that of "clear and present danger" and that of "no prior restraint". Let me delineate.

In cases involving fundamental human liberties—such as freedom of the press—there must (and properly should) be shown, before there may be a suppression, a "clear and present danger" of the substantive evils which the Legislature has a right to prevent, Schenck v. United States, 249 U. S. 47, 52, 39 S. Ct. 247, 63 L. Ed. 470; followed in Dennis v. United States, 341 U. S. 494, 71 S. Ct. 857, 95 L. Ed. 1137; Thornhill v. State of Alabama, 310 U. S. 88, 105, 60 S. Ct. 736, 84 L. Ed. 1093, and the court has a

concomitant obligation to enforce. Police power may be exercised only when the public generally requires such interference and not to protect the interests of a particular class. Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. Ed. 385. The well-supervised adolescent and the well-disciplined adult are not those whom all law must be designed to shield. It cannot, I think, seriously be gainsaid that the public generally does have a vital interest in shielding the immature mind (of whatever age) from lust-stimulating and vice- 176
arousing pornography. There are numbers of our population who, although they have reach majority, harbor dormant criminal instincts that are easily aroused by the pornographic script, the violent narration and the indecent picture. It may be thought that to keep "Nights of Horror" from the young in years would require only legislation similar to those criminal laws regulating sale of alcoholic beverages, tobacco and firearms; but that appears to have been considered by the Legislature not to be enough— and not without some basis. (Nor, unfortunately, 177
have public education, religious training, parental guidance and psychiatric care been the complete solution.)

While section 1141 of the Penal Law was designed to punish the offenders, that has been found not to be sufficient (Report of the New York State Joint Legislative Committee to Study the Publication of Comics, Leg. Doc. [1954] No. 37, p. 32). The Penal Law provides for punishment of the guilty, but the susceptible public remains contaminated with pornographic filth and stimulation. So long as enforcement of this criminal law is not effective (for whatever

reason), and so long as publishers and distributors are willing to risk spasmodic misdemeanor convictions for the huge profits which apparently accrue from the exploitation of pornographic vice, section 22-a was deemed necessary. And if one is willing to risk (and unable to escape) repeated punishment for the sake of keeping an obscene publication alive, he could go to (and for a time remain in) jail, but his obscenity would survive. It was not considered in the best in-
179 terests of the State to have jail cells overcrowded, be it with publishers and distributors who have violated section 1141 of the Penal Law or with teen-agers and others whose latent abnormal emotions have become aroused by such lascivious and vicious material as that which makes up the "Nights of Horror". The legislative intent and purpose are to keep such books as the "Nights of Horror" from the impressionable public. While this court has sufficient confidence in the people of this state to feel that "Nights of Horror" can never survive, the immediate and
180 long-range public interests were thought by the Legislature to require that the death blow be hastened. The Legislative Committee found that "the reading of these publications contributes to juvenile delinquency, stimulates sexual desire, lowers standards of morality and interferes with the normal development of sexual tendencies in both adolescents and adults". (Report, supra, pp. 34-35). The Legislature held injunction and suppression to be the only effective means to combat such a malignancy. It is not for the court —on the evidence before me—to say that there is no basis for this legislative finding and that

the suggested remedy in these times is necessarily wrong. Indeed no evidence whatsoever was sought to be submitted by the defendants which would tend in any way to challenge or controvert the legislative finding.

I do not consider censorship generally in the best public interest; and I would take a different view of *literature* even though it contained matter involving sex and crime. But the proof submitted on behalf of the plaintiff, a reading of the several issues of the "Nights of Horror", 182
the studies and reports of the New York State Joint Legislative Committee to Study the Publication of Comics, of the Special United States Senate Judiciary Sub-Committee on Juvenile Delinquency, and of the Select Committee of the United States House of Representatives on Current Pornographic Materials, and our every-day observations of the shocking rise of juvenile delinquency and sex crimes—all these lead us more easily to read the scale of public interests which plead for the suppression of these publications. All these indicate such a clear and present danger 183
of substantive evils that, as a judge, I cannot ignore the cry unless the Constitution says I must. I do not find that it does. On the contrary, while there appears to be no case in point, I do cite what the Supreme Court of the United States had occasion to say in Chaplinsky v. State of New Hampshire, 315 U. S. 568, 571-572, 62 S. Ct. 766, 769, 86 L. Ed. 1031: "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are

certain well-defined and narrowly limited classes of speech, the prevention and punishment of which [have] never been thought to raise any Constitutional problem. These include the lewd and obscene * * *. [S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." See also Ex parte Jack-
185 son, 96 U. S. 727, 736, 24 L. Ed. 877.

The defendants argue that section 22-a is an unconstitutional violation of free speech in that it enforces a "previous restraint" upon the dissemination of ideas. I do not agree. To assume, even arguendo, as the defendants do, that the Legislature may constitutionally provide that one who publishes obscene matter is subject to criminal prosecution and imprisonment, see Winters v. People of State of New York, 333 U. S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840; Chaplinsky v. State of New Hampshire, 315 U. S.
186 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031, and yet cannot be civilly enjoined from the continued distribution of that same matter, is indulging in a misapprehension as to what is really meant by "prior restraint"—and, on the basis of that misconstruction, is making a fetish of semantics rather than pleading a sound constitutional principle. I recognize that those concerned with freedom—and that, of course, includes the courts—have the responsibility of seeing to it that each individual book or publication, whatever its contents, price, or method of distribution, is dealt with in accordance with due process of law.

Adequate notice, judicial hearing, fair determination, are the essence of "due process" and this is what the statute here has assured. I am of the considered opinion that when the court—after an adversary hearing—is able to read and examine the publications objected to, and acts judicially to enjoin their distribution, it is apparent that there is no "previous restraint" in the genuine historical and constitutional sense of that term, compare the statutory plan described in Attorney General v. Book Named "Forever Amber", 323 Mass. 302, 81 N. E. 2d 663, and Attorney General v. Book Named "God's Little Acre", 326 Mass. 281, 93 N. E. 2d 819. 188

In the circumstances, the contention that there is here an unconstitutional prior restraint is invalid. Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625, 626, 75 L. Ed. 1357, relied upon so heavily by the defendants, is not a holding to the contrary. The Minnesota statute provided that a person who possessed or circulated " '(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or (b) a malicious, scandalous and defamatory newspaper, magazine or other periodical' " (Minn. Stats. 1927, §10123-1) was guilty of a nuisance which could be enjoined. The question before the Court did not involve the obscenity provision of the statute, but clause "b", relating to an alleged "scandalous and defamatory newspaper" known as "The Saturday Press". The Supreme Court of the United States included in its opinion several basic expressions which clearly differentiate its holding there from the one I am about to make in the case at bar. At pages 715-716 of 283 U. S., at page 631 of 51 S. Ct., the Court said: "The 189

The statute clearly imposes a prior restraint and was held void upon its face. The fact that provision is made (as is not unusual—see Article 78 of the Civil Practice Act) for a judicial review of the licensor's determination does not remove the permit feature from the sphere of a previous restraint. 310 U. S. at page 306, 60 S. Ct. at page 904. That is not this case. Section 22-a does not provide for a permit or a license; it does not require any application or fee. It does not suppress in advance what is to be published. The 194
Legislature has simply determined that what has long been recognized as criminal (section 1141 of the Penal Law) the Supreme Court may enjoin and abate in a civil suit (section 22-a of the Code of Criminal Procedure). Provision has been made at the very outset for judicial action in the sphere of recognized equity jurisdiction and jurisprudence. Injunctions and abatements—when decreed by the court after due notice and trial—are not a species of objectionable censorship but rather are judicial determinations of justiciable controversies.

I recognize, of course, that remedy by injunction against words is exceptional—and, in my view, should properly be reserved for those cases where the exigency is clear (see Pound, Equitable Relief against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 666; Chafee, Free Speech in the United States, pp. 9-10). But there have been and are such cases, and injunctions against certain obnoxious utterances are not without authoritative precedent. To mention one type of such injunction—thoroughly litigated during recent decades—I need but refer to cases involving labor disputes in which it has been held

that it is within the recognized jurisdiction of a court of equity to restrain, under certain circumstances, the reiteration of false, misleading and fraudulent statements—notwithstanding the constitutional guarantees against infringement upon the rights of free speech and free press. See Nann v. Raimist, 255 N. Y. 307, 317, 174 N. E. 690, 694, 73 A. L. R. 669; cf. Schlesinger, A Summary and Critique of the Law of Peaceful Picketing in New York, 22 Fordham L. Rev. 20, 41-47;
197 Burstein, Picketing and Speech, 4 Labor Law Journal 791.

It may be that, in certain cases, it would be helpful to obtain the fair verdict of a jury of reasonable adults in the community as to whether any particular publication is or is not obscene within the meaning of the statute. No doubt a jury is generally better fitted than a court to determine whether some books are obscene. "Far better than we is a jury drawn from those of varied experiences, engaged in various occupations, in close touch with the currents of
198 public feeling, fitted to say whether the defendant had reasonable ground to believe that a book such as this was obscene or indecent." Halsey v. New York Society for Suppression of Vice, 234 N. Y. 1, 6, 136 N. E. 219, 220.

Upon the application, in the case of a misdemeanor prosecution in the City of New York, the court may certify that it is reasonable that the charge be prosecuted by indictment—with the consequent effect that the trial be by jury, New York City Criminal Courts Act, §31, subd. 1(c). But the constitution of this State does not compel jury trials of misdemeanor charges, Art. VI, §18, and violation of section 1141 of the

Penal Law is a misdemeanor. That a jury is not ordinarily a part of the judicial tribunal in equity cases is well known. Jamaica Savings Bank v. M. S. Investing Co., Inc., 274 N. Y. 215, 221, 8 N. E. 2d 493, 495, 112 A. L. R. 1485. Yet, a jury trial of certain issues may be granted on the equity side of the court, or denied, in the exercise of the chancellor's discretion, Civil Practice Act, §430. No application for a jury trial was made here—perhaps because there can be no doubt that "Nights of Horror" is unquestionably 200
within the category of the obscene.

The corporation counsel has, however, gone beyond pleading for an injunction to restrain acquisition and distribution of what has been and is; he seeks to enjoin what he contends might be. He urges me to enjoin not only the "further sale" and "further distribution"—to use the precise language of the empowering statute, section 22-a—of the issues of obnoxious publication in evidence, but also the sale and distribution of later issues as well. The statute does not, in express terms, compel such a determination. 201
Only by implication and construction could it be said that the legislative prohibition was intended to cover not only a publication presently in existence, but one not yet in being and therefore not subject to judicial examination. I am of the view that to rule against a volume not offered in evidence would do just what the courts have held is constitutionally forbidden—that is, to impose an unreasonable prior restraint upon freedom of the press.

Our constitutional jurisprudence abounds with precedents denying unlawful previous restraints upon the cherished freedoms guaranteed by the

objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." And then the Court stated in 283 U. S. at page 716, 51 S. Ct. at page 631, that one of these exceptions is that "the primary requirements of decency
191 may be enforced against obscene publications" and that "[t]he security of the community life may be protected against incitements to acts of violence". And in the more recent case of Joseph Burstyn, Inc., v. Wilson, 343 U. S. 495, 72 S. Ct. 777, 96 L. Ed. 1098 (which struck down, as repugnant to the First and Fourteenth Amendments, a licensing statute with respect to motion picture films), the Court expressly reserved the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene
192 films." 343 U. S. at page 506, 72 S. Ct. at page 782.

Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is cited by the defendants as authority for the proposition that so-called censorship by the judiciary—even though action is based, as it is here, on due process and judicial determination—is just as impermissible as advance censorship by an administrative officer. That case deals with a statute forbidding solicitation for a religious cause without first obtaining a certificate from a designated official, who may withhold the permit if he determines that it is not a religious cause.

Constitution. Prior restraints have been held invalid not only in Near v. State of Minnesota, 283 U. S. 697, 713, 51 S. Ct. 625, 75 L. Ed. 1357, but this basic doctrine of constitutional law has been applied in every area of the First Amendment: speech, press, assembly, and religion. Saia v. People of State of New York, 334 U. S. 558, 68 S. Ct. 1148, 92 L. Ed. 1574 (permit for use of sound trucks); Kunz v. People of State of New York, 340 U. S. 290, 71 S. Ct. 312, 95 L. Ed. 280
203 (permit required to hold public worship meetings on street); Lovell v. City of Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949 (permit required for distribution of pamphlets); Cantwell v. State of Connecticut, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213 (permit required for solicitation of moneys for religious causes); Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (previous restraint on speech and assembly); Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325, 328, 95 L. Ed. 267, 280 (permit for use of park for holding meeting); Largent v. State of Texas, 318
204 U. S. 418, 63 S. Ct. 667, 87 L. Ed. 873 (permit for soliciting orders for books or various household articles); Jamison v. State of Texas, 318 U. S. 413, 63 S. Ct. 669, 87 L. Ed. 869 (distribution of hand bills); Schneider v. State of New Jersey (Town of Irvington), 308 U. S. 147, 60 S. Ct. 146, 84 L. Ed. 155 (distribution of pamphlets without permit); Grosjean v. American Press Co., Inc., 297 U. S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (tax on newspaper circulation); Superior Films, Inc., v. Department of Education, 346 U. S. 587, 74 S. Ct. 286, 98 L. Ed. 329, and Joseph Burstyn, Inc., v. Wilson, 343 U. S. 495,

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72 S. Ct. 777, 96 L. Ed. 1098 (vague general standard in pre-licensing of motion pictures). The Court of Appeals of New York spoke out on this subject as early as 1839, Brandreth v. Lance, 8 Paige 24, but the most articulate pronouncement was not to be heard until Chief Justice Hughes' opinion in 1931 in Near v. State of Minnesota, 283 U. S. 697, 51 S. Ct. 625, 75 L. Ed. 1357. There, the United States Supreme Court declared invalid a state statute as a previous restraint upon the freedom of the press as guaranteed by the First and Fourteenth Amendments. Since the injunction in that case sought to suppress future issues of a periodical (found to have been defamatory in the past), it was held that the decree was too broad as an unreasonable restraint upon the press, and that either civil or criminal libel after publication would have afforded an adequate remedy.

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Since there cannot possibly be an assurance that a future issue would necessarily be obscene, the requested advance suppression of what might be seems (at least to me) to be violative of the constitutional right of free press. Be that as it may, it is an established principle of our law that a statute must, if possible, be so construed as to be constitutional, Crowell v. Benson, 285 U. S. 22, 46, 52 S. Ct. 285, 76 L. Ed. 598; Panama Railroad Co. v. Johnson, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408, 29 S. Ct. 527, 53 L. Ed. 836; Kauffman & Sons Saddlery Co., Inc. v. Miller, 298 N. Y. 38, 44, 80 N. E. 2d 322, 324, and even to avoid, if possible, raising substantial constitutional questions. See Peters v. Hobby, 75 S. Ct. 790; Kupferman and O'Brien,

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Motion Picture Censorship—The Memphis Blues, 36 Cornell L. Q. 273, 278-280. Had the legislation now under attack offered the entire scope of relief sought by the plaintiff (i.e. the injunction against all future issues), it would, I sense, raise serious constitutional questions.

In consequence it follows that there can be no injunction regarding an unpublished book or pamphlet—however likely it may be thought that it will, when issued, be violative of the statute.
209 Unless the work be before the court at the time of the hearing at which the injunction is sought, it is inappropriate to make a judicial determination with respect to it. In respect of this feature of the case, the plaintiff seeks a likely trespass upon a constitutionally protected area, and the court must reject that prayer.

The defendants also contend (without argument or citation) that the judgment which I am about to render would amount to an unconstitutional seizure, U. S. Const. Amend. IV; N. Y. Const. Art. I, sec. 12. I hold this claim to be
210 wholly without merit.

The prohibition against "unreasonable searches and seizures" does not, I take it, forbid judicially declared action based upon constitutionally authorized jurisdiction—and duly taken thereunder, cf. Matter of Both, 200 App. Div. 423, 192 N. Y. S. 822—but rather against certain action sans due judicial sanction. A court of equity, I have now held, may constitutionally be given power to enjoin the sale and distribution of existing obscene publications. I do not see wherein it may not also validly be given jurisdiction concomitant therewith to compel the surrender and

destruction of such publications. The law books are not without analogies, although I found no precise precedents one way or the other.

Replevin is an ancient legal remedy. The abatement of a nuisance has long been known in the field of equity jurisprudence. When a person is legally arrested, he may be searched to discover and seize the fruits of his crime, see Weeks v. United States, 232 U. S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652; People v. Chiagles, 237 N. Y. 193, 195, 142 N. E. 583, 32 A. L. R. 676; so, 212
too, it may be said that when a "res" is lawfully "arrested", and permanently condemned, the Legislature may authorize its seizure and destruction. Constitutional immunity is granted not from all searches and seizures, but only from those which are "unreasonable", U. S. Const. Amend. IV; N. Y. Const. Art. I, sec. 12; Civil Rights Law, §8; People v. Richter, 265 App. Div. 767, 771, 40 N. Y. S. 2d 751, 754, affirmed People v. Richter's Jewelers, Inc., 291 N. Y. 161, 51 N. E. 2d 690, 150 A. L. R. 560. As Judge Cardozo reasoned in another connection, "the fact that 213
the weapon was contraband, a nuisance subject to destruction * * * might have justified the seizure, the abatement of the nuisance, if the weapon had been exposed to view." People v. Defore, 242 N. Y. 13, 18, 150 N. E. 585, 586, certiorari denied 270 U. S. 657, 46 S. Ct. 353, 70 L. Ed. 784. Firearms and slot machines, for example, have, under certain circumstances, been declared "public nuisances" by the Legislature, and subject to seizure and destruction. As such, they may, after due notice and fair trial, be seized and abated without violating constitution-

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al guarantees. Penal Law, §§982-985, 1899; People v. Whitcomb, 273 App. Div. 610, 79 N. Y. S. 2d 230, appeal denied 274 App. Div. 851, 81 N. Y. S. 2d 923, appeal dismissed 298 N. Y. 635, 82 N. E. 2d 30; People v. Defore, supra. The Legislature has now also classified "obscene" matter as "contraband", and determined that it may be seized and destroyed in pursuance of court decree after an open trial, Code Cr. Proc. §22-a. I hold that the classification is justifiable,
215 that the defendants have been fully and fairly heard, that there is due process of law, and that "seizure" is reasonable and not violative of the constitution.

Specious, too, in my view, is the defendants' challenge directed to the plaintiff's capacity to sue. Section 22-a specifically provides, sub-section 1, that "the [corporation counsel] of any city * * * in which a person, firm or corporation sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute any * * *
216 [proscribed printed matter] may maintain an action for an injunction * * * in the supreme court to prevent the sale or further sale or the distribution or further distribution or the acquisition or possession of" that matter.

The Charter of the City of New York provides for the appointment of a corporation counsel by the mayor, Section 391. Section 394, subd. a, of the Charter reads: "*Except as otherwise provided by law,* the corporation counsel shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all

the law business of the city and its agencies and *in which the city is interested.*" (Emphasis supplied.) In Section 30 of the City Home Rule Law; the Legislature specifically reserved to itself the power "to pass laws regulating *matters of state concern*" (emphasis supplied); See also Article 9 of the State Constitution).

I hold that Section 22-a of the Code of Criminal Procedure is an instance in which "otherwise" was "provided by law". In addition, what may be "matters of state concern" may also be something "in which the city is interested." The 218
publication and distribution of material devoted to obscenity, lewdness, lasciviousness, filth, indecency and disgust—to crime, sex, horror, terror, brutality, lust and depravity—have been found by the Legislature to be a contributing factor to juvenile delinquency, a basic factor in impairing the ethical and moral development of our future citizens, and a clear and present danger to the people of our State. As such, these are, it seems to me, "matters of state concern" "in which the city is [also] interested." 219

Judgment is rendered in the plaintiff's favor on the merits to the extent herein indicated. The defendants*** will be permanently enjoined from distributing, selling or acquiring possession of

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*** Since the institution of this action, Adrian P. Burke resigned as Corporation Counsel of the City of New York, and Peter Campbell Brown, thereafter duly appointed Corporation Counsel, is substituted as plaintiff in his stead.

On motion of the plaintiff the title of the action is also amended, with respect to certain of the defendants, as follows: (1) "Louis Finkelstein, doing business as Times Square Book Shop", instead of "Times Square Book Shop, Louis Finkelstein", and (2) "Philip Pellegrino,

any of the volumes of the publication entitled "Nights of Horror" received in evidence upon the trial, and they will be directed to surrender to the Sheriff of the City of New York (New York County Division) all copies of these volumes now in their possession, and the Sheriff will be directed to seize and destroy them. Settle judgment accordingly. The parties having duly waived findings of fact and conclusions of law, this opinion will constitute the decision of the court in pursuance of the provisions of the Civil Practice Act.

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doing business as Pelley Book Shop" instead of "Pelley Book Shop, Philip Pellegrino".

The defendants Metropolitan Book Shop Inc., and Philip Pellegrino did not appear, although served with process. The defendant Anne Goldberg was not served with process and is deceased. The defendants Publishers Outlet and Gordon Law were not served with process.

223

Stipulation Settling Case

IT IS HEREBY STIPULATED that the foregoing case contains all the evidence given upon the trial of this action, and the same may be settled and ordered to be filed and annexed to the judgment roll herein.

Dated: New York, N. Y.
October , 1955.

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defendants-Appellants

224

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

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Order Settling and Filing Case

On the above stipulation the foregoing Case on Appeal containing all the evidence, is hereby settled and ordered on file.

Dated: New York, N. Y.
October , 1955.

MATTHEW J. LEVY
J. S. C.

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Stipulation Waiving Certification

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the Notices of Appeal, Judgment Roll and Case and Exceptions as settled, and the whole now on file in the Office of the Clerk of the Supreme Court of the State of New York, County of New York, and certification thereof by the Clerk pursuant to Section 616 of the Civil Practice Act is hereby waived.

230

Dated: New York, N. Y.
October , 1955.

EMANUEL REDFIELD
Attorney for Kingsley Books, Inc. and Martin Kleinberg, Defendants-Appellants

SIDNEY GLASSER
Attorney for defendant Louis Finkelstein, Defendant-Appellant

231

PETER CAMPBELL BROWN
Attorney for Plaintiff-Respondent

[fol. 79] Clerk's and Judge's Certificates to foregoing paper omitted in printing.

[fol. 80] In the Circuit Court of Appeals of New York

Peter Campbell Brown, Corporation Counsel of the City of New York, Respondent

v.

Kingsley Books, Inc., et al., Appellants, and Metropolitan Book Shop, Inc., et al., Defendants

Opinion—Decided April 27, 1956

Fuld, J. Although we are all agreed for affirmance, we reach that conclusion by somewhat different routes. The importance and perplexities of the constitutional issue presented persuade me that there must be more full discussion than some of my associates believe necessary of the reasons for and the reach of the decision being made.

[fol. 81] Enacted in 1941 (L. 1941, ch. 925) and amended in 1954 (L. 1954, ch. 702), section 22-a of the Code of Criminal Procedure was designed to supplement existing criminal sanctions by providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene. Modeled on the language of section 1141 of the Penal Law, the statute prohibiting the sale and distribution of items obscene, section 22-a, insofar as here pertinent, embraces "any book, magazine, pamphlet, comic book, story paper, writing paper, picture, drawing, photograph, figure, image or any written or printed matter of an indecent character, which is obscene, lewd, lascivious, filthy, indecent or disgusting". It vests the right to maintain the action in the chief executive or legal officer of any city, town or village and provides that it may be brought against anyone who "sells or distributes or is about to sell or distribute or has in his possession with intent to sell or distribute or is about to acquire possession with intent to sell or distribute" any such matter (subd. 1). If an injunction is granted, the statute continues, the resulting order of judgment must direct the defendant to

"surrender" the offending matter to the sheriff who "shall be directed to seize and destroy the same" (subd. 3).

The present suit, instituted by the Corporation Counsel of the City of New York against a number of book sellers with premises in that city, concerns a series of paper-bound booklets collectively entitled "Nights of Horror". Members of the police force testified at the trial that the booklets had been displayed for sale in defendants' stores and that they had purchased a number of copies from the various defendants, at prices ranging from $2 to $4 each. The publications themselves were also introduced in evidence. The trial judge, in a carefully considered opinion, found that the booklets were plainly obscene and pornographic, "dirt for dirt's sake", and held that the statute did not violate any constitutional guarantee. He thereupon granted judgment (1) permanently enjoining defendants from distributing, selling, or acquiring possession of such publications, (2) requiring them forthwith to surrender to the sheriff for destruction all copies in their possession and (3) directing the sheriff to seize and destroy such copies, in the event of defendants' failure to surrender them.

The paper-covered booklets before us are indisputably pornographic, indisputably obscene and filthy. Defendants concede as much and also acknowledge, in effect, that, had they been criminally prosecuted for violating the obscenity provisions of the Penal Law, no constitutional argument could successfully have been leveled against resulting convictions. Indeed, not questioning the definiteness of the [fol. 82] statutory standard, not challenging the test of obscenity applied by the trial judge, who concluded that the booklets were obscene under any of the judicially announced criteria and not objecting to the failure to require a jury trial,[1] defendants' sole attack upon the statute is

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[1] It may be well to note that in a criminal prosecution based upon section 1141 of the Penal Law, involving as it does a misdemeanor charge, the defendant is not entitled to a trial by jury as a matter of constitutional right. (N. Y. Const., art. VI, § 18; see *People* v. *Kaminsky*, 208 N. Y. 389, 394; *People ex rel. Cosgriff* v. *Craig*, 195 N. Y. 190, 195-196; see, also, N. Y. City Crim. Cts. Act, § 31; subd. 1, pars. [b], [c].)

that the remedy by injunction constitutes an unconstitutional "prior restraint," interfering with freedom of speech and press (U. S. Const., 1st and 14th Amendts.; N. Y. Const., art. I, § 8).[2]

There is, of course, no doubt that freedom of speech and press, so basic to a free and dynamic society, extends to all media of expression (see *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495, 501-502; see, also, Chafee on Free Speech in the United States [1941], p. 545), that it protects distribution as well as initial publication (see *Lovell* v. *Griffin*, 303 U. S. 444; *Grosjean* v. *American Press Co.*, 297 U. S. 233) and that it embraces writings or other forms of expression designed for entertainment or amusement, as well as those concerned with the exposition of ideas. (See *Winters* v. *New York*, 333 U. S. 507, 510; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 153.) While the right of free expression is not absolute or unqualified under all circumstances, it is clear that any invasion of that right must find justification in some overriding public interest, and that restricting legislation must be narrowly drawn to meet an evil which the state has a substantial interest in correcting. (See *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 502-504; *Feiner* v. *New York*, 340 U. S. 315, 319; *Niemotko* v. *Maryland*, 340 U. S. 268, 271-272; *Winters* v. *New York*, *supra*, 333 U. S. 507, 509; *Cantwell* v. *Connecticut*, 310 U. S. 296, 307-308; *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98, 105.)

That clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter,[3] at least by the application of criminal sanc-

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[2] We do not concern ourselves with the further provision of the statute directing the court to render its decision "within two days of the conclusion of the trial" (subd. 2), in view of the fact that the parties agreed neither to invoke nor insist upon that requirement.

[3] It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See e.g., Jahoda and Staff of Research Center for Human Relations, New York University [1954], The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)

[fol. 83] tions is not barred by the free speech guarantees of the First Amendment, has been recognized both by this court (see *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd., by equally divided court, 335 U. S. 848; *People* v. *Wendling*, 258 N. Y. 451; *People* v. *Pesky*, 254 N. Y. 373; *People* v. *Muller*, 96 N. Y. 408) and by the United States Supreme Court. (See *United States* v. *Alpers*, 338 U. S. 680; *Winters* v. *New York*, *supra*, 333 U. S. 507, 510, 518, 520; *United States* v. *Limehouse*, 285 U. S. 424; see, also, *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Beauharnais* v. *Illinois*, 343 U. S. 250 266.) Imprecise though it be—its "vague subject-matter" being largely "left to the gradual development of general notions about what is decent" (per L. HAND, J., *United States* v. *Kennerley*, 209 F. 119, 121)—the concept of obscenity has heretofore been accepted as an adequate standard. Indeed in the *Winters* case (*supra*, 333 U. S. 507), the court not only indicated that collocation of the very words found in section 1141 of our Penal Law, "obscene, lewd, lascivious, filthy, indecent or disgusting", is sufficiently "well understood through long use in the criminal law" to satisfy the due process requirements of definiteness and certainty (333 U. S. at p. 518), but actually pointed to the provisions as "an example" of a statute wherein "apt words" are used "to describe the prohibited publications" (333 U. S., at p. 520).[4]

Thus, by virtue of section 1141, it has long been a misdemeanor in this state, punishable by imprisonment or fine or both, to sell or distribute any written or printed obscene material of the kind described in section 22-a of the Code, and similar statutes are in effect in almost all of the other jurisdictions in this country (see Note, 22 U. of Chicago L. Rev. 216). The legislature, however, apparently concluded that

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[4] Application of the standard may, perhaps, raised constitutional questions in individual cases (cf. *Doubleday & Co.* v. *New York*, 335 U. S. 848, affg., by equally divided court, 297 N. Y. 687, *supra*; *Roth* v. *Goldman*, 172 F. 2d 788, 792, per FRANK, C. J., concurring; see Lockhart & McClure, Literature, The Law of Obscenity and the Constitution, 38 Minn. L. Rev. 295), but the present is not such a case.

such penal sanctions were inadequate to stem the rising tide of obscene and pornographic publications that have, in recent years, flooded the book and periodical market, and the supplemental remedy of an equity action for an injunction was thereupon devised. (Cf. Report of New York State Joint Legislative Committee to Study the Publication of Comics, N. Y. Legis. Doc., 1954, No. 37, pp. 31-32.) Whether or no the legislature acted wisely is, of course, no concern of the courts. Our inquiry is limited to whether its act transcends constitutional limits.

[fol. 84] As already noted, no injunction may issue under section 22-a except after a full trial of the issues, and only upon a finding that the challenged publication is of the same character as would subject the defendant to punishment under the pertinent provisions of the Penal Law. What the statute does is to provide an additional sanction against the dissemination of obscene matter.

It is, however, defendants' position that the constitution limits the state to the imposition of punishment, and that distribution of the writing itself may not be prevented. An injunction, such as the present one, even though it is issued after publication and after a judicial trial, is characterized as such suppression and censorship as to stamp it an impermissible "prior restraint." In other words, it is urged that as long as the publisher or vendor of a writing is willing to risk the imposition of criminal penalties he has an absolute right to proceed with its publication or distribution and any restriction of that right is unwarranted, since, among other things, it would deprive the public of the opportunity of reading and making its own appraisal of the challenged material.

The major, though not exclusive, purpose of the guarantee of free expression is "to prevent previous restraints upon publication." (*Near* v. *Minnesota, supra,* 283 U. S. 697, 713; *Joseph Burstyn, Inc.* v. *Wilson, supra,* 343 U. S. 495, 503.) Though difficult of exact formulation (see Emerson, The Doctrine of Prior Restraint, 20 Law and Contemporary Problems 648), this principle of immunity from prior restraint has been applied by the United States Supreme Court in a variety of situations to strike down li-

censing or censorship systems under which the right of speech, publication or assembly was conditioned upon obtaining the advance approval of an executive board or official vested with broad or undefined discretion. (See, e.g., *Poulos* v. *New Hampshire*, 345 U. S. 395; *Kunz* v. *New York*, 340 U. S. 290; *Niemotko* v. *Maryland*, *supra*, 340 U. S. 268; *Cantwell* v. *Connecticut*, *supra*, 310 U. S. 296; *Schneider* v. *State*, 308 U. S. 147.) As has been pointed out, however, "the protection even as to previous restraint is not absolutely unlimited", although the limitation has been recognized "only in exceptional cases". (*Near* v. *Minnesota*, *supra*, 283 U. S. 697, 716; *see, also, Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495, 504.)

The Supreme Court has asserted, by way of dictum, that the control of obscenity presents such an exceptional case. In *Near* v. *Minnesota* (*supra*, 283 U. S. 697, 716), Chief Justice HUGHES, in discussing certain extraordinary areas exempt from the sweeping prohibition against prior restraint, stated that one of the exceptions was that "the primary requirements of decency may be enforced against [fol. 85] obscene publications", and similar reservations have also been expressed elsewhere. (See *Chaplinsky* v. *New Hampshire*, *supra*, 315 U. S. 568, 571-572, *Lovell* v. *Griffin*, *supra*, 303 U. S. 444, 451; see, also, Chafee, *op. cit.*, p. 10.) But the precise issue whether restraints in advance of publication may be applied to obscene matter has not yet been squarely decided. Questions involving the validity of state systems of censorship of motion pictures have on several recent occasions come before the Supreme Court, but in each instance the case has been disposed of by striking down some particular standard or criterion on the ground that it did not satisfy the minimum requirements of definiteness and certainty. (See *Superior Films* v. *Department of Educ.*, 346 U. S. 587; *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587; *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, 343 U. S. 495; *Gelling* v. *Texas*, 343 U. S. 960; cf. *Holmby Productions* v. *Vaughn*, 350 U. S. 870.) The court has specifically left open the question "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films."

(*Joseph Burstyn, Inc.* v. *Wilson*, *supra*, 343 U. S. 495, 505-506.) [5]

We are not, in my opinion, required in this case to decide categorically the validity, under all circumstances, of any and every prior restraint aimed at obscene matter, regardless of the nature and scope of the regulatory measure employed or of the particular medium of expression involved. While strong objections have been voiced against any practice of general censorship, even in the area of obscenity, and whether administered by an executive agency or a judicial tribunal (see Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 661, 670-671; Rice, The Supreme Freedom: Three Hundred Years After Milton, pp. 105, 111-112; contained in Great Expressions of Human Rights, edited by R. M. MacIver, published in 1950 by Institute for [fol. 86] Religious and Social Studies; cf. *Superior Films* v.

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[5] I do not believe that *Holmby Productions* (*supra*, 350 U. S. 870) answers this question. The Kansas statute there considered provided for the banning of any motion picture found by the state's board of review to be "obsence, indecent or immoral, or such as tend to debase or corrupt morals". The film, "The Moon is Blue", while labeled by the board as "obscene," as well as "indecent and immoral," was specifically condemned for the following stated reason: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme." The Supreme Court reversed the judgment of the Kansas high court which had accepted the board's interpretation of the statute as well as its determination (177 Kan. 728). It is our surmise that this decision of the Supreme Court—reflected in a *Per Curiam*, merely citing *Burstyn* (*supra*, 343 U. S. 495) and *Superior Films* (*supra*, 346 U. S. 587)—turned solely on the wide reach and the essential vagueness of the standard employed by the Kansas court. Since any film could apparently be banned as "obscene, indecent or immoral" if a sex theme predominated, the term "obscene" was no narrower, no more definite or certain, than the criteria previously stricken as too vague in the *Commercial Pictures* and *Superior Films* cases (*supra*, 346 U. S. 587).

Department of Educ., supra, 346 U. S. 587, 588, per Douglas, J., concurring), that broad question is not here presented. Sharp and precise lines cannot always be drawn between permissible and nonpermissible regulatory measures in the realm of expression. (See *Winters* v. *New York, supra,* 333 U. S. 507, 518; *Joseph Burstyn, Inc.*, v. *Wilson, supra,* 343 U. S. 495, 517-518, per Frankfurter, J., concurring.) Whatever might be said of a scheme of advance censorship directed against all *possibly* obscene writings, the case before us concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees. (Cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650-651.)

There is nothing in section 22-a that constitutes or resembles a system of licensing or other threshhold approval, which would, for example, operate as a pervasive restraint upon all expression relating to sex problems or behavior and which would ban and suppress, without a censor's imprimatur, any work of literature dealing with those subjects. On the contrary, the statute makes no attempt to subject writings to the scrutiny and screening of a censor prior to publication. The statutory procedures may be invoked only after publication, and no work may be condemned except upon a formal adjudication of obscenity after a trial conducted in accordance with the essential requirements of due process of law. The mind of the trial judge must be satisfied, from a reading of the challenged writing and a consideration, of other pertinent evidence, that it is, indeed, of the type and character condemned by the statute. Moreover, his findings are subject to full appellate review on the facts as well as on the law (Civ. Prac. Act, § 584). The procedures thus provided are to be contrasted with the usual features of advance censorship, under which a large measure of discretion is reposed in the censoring official, the procedural safeguards of judicial proceedings are not available, only limited judicial review is allowed and the burden rests on the publisher or vendor to establish the arbitrariness of an adverse ruling. (See Emerson, *supra*, 20 Law and Contemporary Problems, at pp. 656-660.)

In point of fact, examination of the operation and effect of section 22-a reveals substantially no greater interference with the freedom of the publisher or vendor than that presented by the possibility of punishment under the Penal Law. There can be little doubt that the rigid enforcement of such penal provisions, though operating by indirection, may serve as effectually as direct action by injunction, if [fol. 87] not more so, to deter publication of an obscene work. (See Pound, *supra*, 29 Harv. L. Rev., at p. 651; Emerson, *supra*, 20 Law and Contemporary Problems, at p. 660.) In the final analysis, the effectiveness of the injunctive remedy must itself depend upon punitive sanctions, by way of contempt proceedings, for its enforcement; and, if a publisher or vendor would not be deterred by the prospect of prosecution under the Penal Law, he might equally be unaffected by the threat of punishment for contempt. These words are, of course, limited to the statute before us dealing with obscenity, and nothing here written is to be taken as sanctioning the injunctive process in dealing with other objectionable or antisocial material, such as libel.

The reliance which defendants place upon *Near* v. *Minnesota* (*supra*, 283 U. S. 697) is untenable. That case concerned a Minnesota statute which authorized the issuance of an injunction, in a suit to be brought in the name of the state, against the further publication of any newspaper or periodical adjudged to be "malicious, scandalous and defamatory".[6] Under the statute, any articles deemed to be derogatory to a public officer could be branded "malicious, scandalous and defamatory", if the publisher were unable to establish that they were true *and* "published with good motives and for justifiable ends" (283 U. S., at pp. 709-710). Once such an injunction was issued, resumption of any fixture printing was banned and punishable as a contempt, unless the publisher was able to satisfy the court as to the character of the new publication. The court would thus be constituted a censor to pass on the contents of future issues

[6] The same statute also authorized an injunction against the further publication of any newspaper or periodical adjudged to be "obscene, lewd and lascivious", but that portion of the statute was no involved in the case.

in advance of publication, and whether the publisher "would be permitted again to publish matter deemed to be derogatory to the same or other public officers would depend upon the court's ruling" (283 U. S., at p. 712). It was this feature of the law, particularly as applied to newspaper comment upon matters of public importance, upon ideas in the realm of political expression, that was regarded by the Supreme Court as "of the essence of censorship" and an unwarranted infringement on freedom of discussion (283 U. S., at p. 713).

The features condemned in *Near* are here absent. The statute now under consideration deals exclusively with matters in the field of lustful emotion. Erotics, not politics, is its subject, and, as already noted, the writings here condemned are undredeemed by even an iota of idea content or of artistic worth. And, unlike the statute in *Near* which sanctioned a general and future restraint, there is here no restraint of any kind on the publication or distribution of [fol. 88] material to be written or produced in the future. The corporation counsel in the court below sought to have the statute read as authorizing an injunction against the sale and distribution, not only of any published work found to be obscene, but also of any future work in the same series. This the trial court very properly refused to do.

In short, careful analysis of the operation and effect of section 22-a, in relation to the basic aims and objectives of the constitutional guarantees, is convincing that the limited injunctive remedy here provided may not be condemned as a forbidden prior restraint. As a matter of fact, analogous decisions under the Federal Tariff Act of 1930 (Act June 17, 1930, ch. 497, tit. III, § 305; U. S. Code, tit. 19, § 1305) suggest that a measure which prescribes a penalty only after the challenged work has already been published does not involve any aspect of prior restraint at all. The Tariff Act thus provides for the seizure by the customs collector of any obscene matter imported into this country, and authorizes the United States District Court to direct the forfeiture, confiscation and destruction of such matter upon adjudication after trial that it is obscene. Although the constitutionality of these provisions has apparently never been passed upon by the Supreme Court, the lower federal

courts have uniformly either held [7] or assumed [8] the statute to be constitutional. Thus, in *United States* v. *One Obscene Book Entitled "Married Love"* (*supra*, 48 F. 2d 821), Judge WOOLSEY rejected the contention that the statute impinged on the right of freedom of the press, noting that it did "not involve the suppression of a book before it is published"; in the course of his opinion, he wrote (p. 822): "After a book is published, its lot in the world is like that of anything else. It must conform to the law and, if it does not, must be subject to the penalties involved in its failure to do so. Laws which are thus disciplinary of publications, whether involving exclusion from the mails or from this country, do not interfere with freedom of the press."

It is further urged that even publications adjudged to be obscene cannot constitutionally be withheld from free circulation in the market place of ideas; that, apart from the rights of the publisher and vendor, the public itself has the right to read and examine whatever is published and to form its own opinion of a publication's value and propriety. But here, as in other situations, the question is one of balancing the several competing interests involved. As the Supreme Court has emphasized, in reference to the federal statute declaring obscene material nonmailable (35 U. S. Stat. 1129, U. S. Code, tit. 18, former § 334), there is no necessity "to satisfy all tastes, no matter how perverted." (*Hannegan* v. *Esquire, Inc.*, *supra*, 327 U. S. 146, 158.)

[fol. 89] In reaching the conclusion which I do, I assume, of course, that the statutory proscription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it "broadly as a whole" (*Halsey* v.

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[7] See *Besig* v. *United States* (208 F. 2d 142); *United States* v. *One Obscene Book Entitled "Married Love"* (48 F. 2d 821, 822).

[8] See *Parmelee* v. *United States* (113 F. 2d 729); *United States* v. *One Book Called Ulysses* (72 F. 2d 705); *United States* v. *One Unbound Volume of Prints* (128 F. Supp. 280).

New York Soc. for Suppression of Vice, 234 N. Y. 1; 4-5), with reference to "its dominant effect", "not on any particular class, but upon all those whom it is likely to reach" (*United States* v. *Levine*, 83 F. 2d 156, 157; *United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 707-708, affg. 5 F. Supp. 182); and that consideration will be given, among other factors, to "the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient". (*United States* v. *One Book Called Ulysses*, *supra*, 72 F. 2d 705, 708.) The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same danger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications.

The judgment appealed from should be affirmed, with costs.

Desmond, J. Defendants expressly admit the (obvious) fact that the books which they sold, and the further sale of which has been here enjoined, are obscene. They thus concede that the books are such as are subject under section 22-a of the New York Code of Criminal Procedure to an injunction at the suit of the corporation counsel who brought this action. Those concessions leave defendants with one possible ground for appeal and that ground they take. Their sole assertion in this court is that section 22-a is unconstitutional because, say defendants, any and every prior restraint on the publication or sale of obscene literature violates the First Amendment. Since no other question is presented, we must limit ourselves to answering that ques- [fol. 90] tion. It detracts nothing from Judge Fuld's fine opinion to point out that its discussion of many other questions not before us on this appeal is not binding on this court.

Answering the one argument made to us, we hold on most ample authority that the First Amendment does not protect

obscene books against prior restraint (*Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572; *Near* v. *Minnesota*, 283 U. S. 697, 716; *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502-504; see *Beauharnais* v. *Illinois*, 343 U. S. 250, 266; *Ex Parte Jackson*, 96 U. S. 727, and *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146). The standard set up by section 22-a, "obscene, lewd, lascivious, indecent or disgusting", is a valid and adequate one (*Winters* v. *New York*, 333 U. S. 507, 518; see *Rosen* v. *United States*, 161 U. S. 29, 42; *Swearingen* v. *United States*, 161 U. S. 446, 451; *Robertson* v. *Baldwin*, 165 U. S. 275, 281; U. S. Code, tit. 18, § 1461; *United States* v. *Limehouse*, 285 U. S. 424; *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 156, 158, *supra*; *Times Film Corp.* v. *Chicago*, —— F. Supp. ——, decided March 21, 1956; *People* v. *Muller*, 96 N. Y. 408; *People* v. *Doubleday & Co.*, 297 N. Y. 687, affd. by equal vote 335 U.S. 848; *Commonwealth* v. *Holmes*, 17 Mass. 335).

No one claims that section 22-a lacks appropriate procedural protections for those sued under it.

The judgment should be affirmed, with costs.

Dye and Van Voorhis, JJ., concur in opinion of Fuld, J.; Conway, Ch. J., and Froessel, J., concur in opinion of Desmond, J.; Burke, J., taking no part.

Judgment affirmed.

[fol. 91] [Caption omitted]

[fol. 92] IN THE COURT OF APPEALS OF NEW YORK

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York, Respondent,

vs.

KINGSLEY BOOKS, INC., MARTIN KLEINBERG and LOUIS FINKELSTEIN, Doing Business as Times Square Book Shop, Appellants, and

METROPOLITAN BOOK SHOP, INC., & Ors., & c., Defendants

REMITTITUR—April 27, 1956

Be it remembered, that on the 31st day of October in the year of our Lord one thousand nine hundred and fifty-five, Kingsley Books, Inc., Martin Kleinberg and Louis Finkelstein, doing business as Times Square Book Shop the appellants in this cause, came here unto the Court of Appeals, by Emanuel Redfield and Sidney Glasser, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the judgment of the Supreme Court, New York County. And Peter Campbell Brown, Corporation Counsel of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals in person.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

[fol. 93] Whereupon, the said Court of Appeals having heard this cause argued by Mr. Emanuel Redfield of counsel for the appellants, and by Mr. Seymour B. Quel of counsel for the respondent —, and after due deliberation had thereon, did order and adjudge that the judgment appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said judgment be affirmed, with costs, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State

of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(Sgd.) Raymond J. Cannon, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office, Albany, April 27, 1956.

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] In Supreme Court of the State of New York
County of New York

Peter Campbell Brown, etc., Appellee,

against

Kingsley Books, Inc., et al, Appellants

Notice of Appeal—May 7, 1956

I Notice is hereby given that Kingsley Books, Inc. and Martin Kleinberg, and Louis Finkelstein, doing business as Times Square Book Shops hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York dated and entered on April 27, 1956, affirming the judgment of this Court dated July 26, 1955.

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II The Clerk will please prepare a transcript of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript, the following:

(1) This notice of appeal and proof of service thereof; (2) The remittitur of the Court of Appeals; and (3) The Case on Appeal filed in the Court of Appeals.

III The following question is to be presented by this appeal:

Is Section 22-a Code of Criminal Procedure of New York unconstitutional in that it violates the due process clause

of the Fourteenth Amendment to the Constitution of [fol. 96] the United States which protects the freedom of speech and press, guaranteed by the First Amendment to the Constitution?

Dated: New York, N. Y. May 7, 1956.

Emanuel Redfield, Attorney for Appellants, Office & P. O. Address, 60 Wall Street, New York 5, N. Y.

To: Peter Campbell Brown, Esq., Corporation Counsel of the City of New York, Municipal Building, New York, N. Y.

[fol. 97] Certificate of service (omitted in printing).

[fol. 98] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 107

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, Doing Business as Times Book Shop, et al., Appellants

vs.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York

Appeal from the Court of Appeals of the State of New York.

ORDER NOTING PROBABLE JURISDICTION—January 14, 1957

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is consolidated with Nos. 61 and 582 and a total of three hours allowed for oral argument.

January 14, 1957.

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MAY 23 1956
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1955.

No. 970 / 101

KINGSLEY BOOKS, INC., LOUIS FINKELSTEIN, doing business as TIMES BOOK SHOP and MARTIN KLEINBERG,

Appellants,

v.

PETER CAMPBELL BROWN, Corporation Counsel of the City of New York,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

EMANUEL REDFIELD,
Counsel for Appellants,
60 Wall Street,
New York 5, N. Y.